86-125

No. ______

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1986

Arthur J. Anderson

Petitioner,

- vs -

United States Department of Agriculture,

Forest Service

Respondent

On Writ of Certiorari To The
Court of Appeals
For The Federal Circuit

Petition For Writ of Certiorari

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Pursuant to statutes protecting "whistleblowers," when reprisals, including a removal, have been taken against a "whistleblowing" employee, does an agency have an affirmative duty to reverse the effects of reprisals and reinstate the employee to a workable and reasonable position?

2. Whether constitutional and statutory due process rights of a federal employee require an impartial and unbiased person to preside over and rule at agency removal proceedings.

3. Whether constitutional and statutory due process rights of a federal employee are violated when the MSPB denies: (a) the right to obtain relevant evidence through discovery, or (b) the right to subpoena witnesses.

PARTIES TO PROCEEDINGS

All parties are listed in the caption.

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REPORTS OF COURTS AND AGENCIES

All decisions by the United States Court of Appeals for the Federal Circuit and the Merit System Protection Board appear in the Appendix hereto. Decisions entered by the Agency itself appear in Petitioner's Appendix presented to the United States Court of Appeals for the Federal Circuit.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed herein, issued by the U.S. Court of Appeals for the Federal Circuit (hereinafter, the "Federal Circuit"), was entered on February 18, 1986. Petitioner herein, Arthur J. Anderson, filed in the Federal Circuit a "Petition for A Rehearing or A Rehearing En Banc" on February 28, 1986, which was duly considered by the Federal Circuit. The Petition for A Rehearing was denied on April 14, 1986. The Petition for

Rehearing En Banc was denied on April 28, 1986. Thereafter, the Federal Circuit issued its Judgment as a mandate on April 28, 1986.

Jurisdiction is properly before the United States Supreme Court pursuant to 5 U.S.C. §7701 which establishes MSPB jurisdiction over removal actions brought against federal employees and 5 U.S.C. §7703 which provides that an appeal from a final order of the Merit Systems Protection Board shall be filed with the Federal Circuit. Petitioner herein duly perfected his appeal to the Federal Circuit which issued its final judgment on the merits.

Therefore, the United States Supreme Court may now properly assert jurisdiction upon a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1). Further, all matters presented herein involve construction and interpretation of statutes enacted by the United States

Congress and/or of the United States Constitution.

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Constitution,

Amendment I.

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for redress of grievances . . . or the right of the people . . . to petition the government for redress of grievances . . .

United States Constitution,

Amendment V.

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

§2301. Merit system principles[1]

(a) This section shall apply to --

(1) an Executive agency;

(2) the Administrative Office of the United States Courts; and

(3) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

* * *

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

* * *

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[1] The full text of sections 2301 and 2302 is set forth in the appendix hereto at K-1 et seq.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

* * *

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

* * *

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences-

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

* * *

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title [5 USCS §§ 1 et seq], "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section-

(A) "personnel action" means-

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title [5 USCS §§ 7501 et seq.] or other disciplinary corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title [5 USCS §§ 4301 et seq.];

(ix) a decision concerning

pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service

* * *

(C) "agency" means an executive agency, the Administrative Office of the United States Courts, and the Government Printing

Office

* * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

* * *

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for-

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

* * *

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title [5 USCS § 2301].

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

* * *

§ 7701. Appellate procedures.

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right-

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * *

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained subsection (b) only if the agency's decision-

(A) in the case of an action

based on unacceptable performance described in section 4303 of this title [5 USCS § 4303], is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment-

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title [5 USCS § 2302(b); or

(C) shows that the decision was not in accordance with law.

* * *

Forest Service Manual, Title 6163.11 - Employee Requests for Absence-

* * *

2. Requests should be made to the work supervisor as far in advance of each anticipated basence as practical. For unalterable absences, notice should reach the work supervisor during the first day of such absence, and preferably during the first hour of the workday. Failure to inform the work supervisor as early as practical could result in the absense being considered unauthorized.

a. Excused absence for voting or registration.

b. Excused absence for tardiness and other brief periods.

c. Sick leave for three workdays or less when it is feasible for the employee to initial the time and attendance report.

d. Annual leave for which it is feasible for the employee to initial the time and attendance report, except that prior written approval is required before planned and approved leave which is later canceled may be considered for restoration.

e. Authorized absence of an employee not entitled to earn leave when the period of absence is one week or less.

f. Leave without pay resulting from receipt of injury compensation from the Office of Worker's Compensation Programs (OWCP).

g. Leave without pay for three workdays or less for which it is feasible for the employee to initial the time and attendance report.

* * *

Code of Federal Regualtions

5 C.F.R.§1201.70 et seq. Discovery

§ 1201.71 Statement of purpose.

. . . Discovery is designed to enable a party to obtain relevant information needed for presentation of the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of Board intervention.

§ 1201.72 Explanation and scope.

(a) Explanation: Discovery is the process apart from the hearing whereby a party may obtain relevant information from another person, including a party, which has not otherwise been provided. Relevant information means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable *or less probable* than it would be without the evidence. . . . The federal rules shall be interpreted as instructive rather than controlling in any event.

* * *

(c) Methods: Discovery may be obtained by . . . production of documents or things for inspection or copying . . .

§ 1201.73. Procedures governing discovery.

* * *

(1) A party, or a federal agency which is not a party, shall answer a discovery request within the time provided by § 1201.73(d)(2) of these regulations either by furnishing to the requesting party . . .

(2) Upon the failure or refusal of a party to respond in full to a discovery request, or a nonparty to respond in full to Board-approved discovery, the requesting party may file with the presiding official a motion to compel.

* * *

§ 1201.31 Motions for subpenas.

(a) *Motion.* A motion for the issuance of subpenas requiring the attendance and testimony of witnesses or the production of documents or other evidence under 5 U.S.C. 12059(b)(2)(A) shall be submitted to the presiding official.

* * *

(b) Form. . . . shall specify with particularity the books, papers, or testimony desired and shall be supported by a showing of general relevance and reasonable scope and a statement of the facts expected to be proven thereby.

(c) *Rulings.* . . . Where the presiding official has the authority he/she shall rule directly on the request.

(d) *Showing.* All requests for subpenas shall be supported by a showing of general relevance, reasonable scope and materiality of the evidence south.

* * *

STATEMENT OF THE CASE

Petitioner's appeal herein involves two cases which were adjudicated by the Denver Regional Office for the United States Merit Systems Protection Board (MSPB). One case, the Petition For Enforcement of Order (hereinafter referred to in general as the "Compliance Action"), further involved a 1980 hearing and adjudication that became final in 1982 after the MSPB Board rejected an appeal by the United States Department of Agriculture, Forest Service, (the Agency) and an initial decision by the Regional MSPB became final (hereafter this decision and order by the MSPB is referred to generally as the "Final Decision"). The Final Decision upheld charges and disclosures made by Petitioner concerning Agency mismanagement, and found that because of Petitioner's disclosures the Agency took actions of reprisal and harassment against him. Therefore, in the

Final Decision the MSPB ordered the Agency to reinstate Petitioner and to cease all reprisals. The Compliance Action, filed by Petitioner May 25, 1982, alleged that the Agency did not obey the Final Decision and order.

The second case involves a recent action brought by the Agency which resulted in the Petitioner's removal from the Agency for alleged "insubordination" (hereinafter referred to generally as the "Removal Action"). The MSPB denied Petitioner relief in the Compliance Action and affirmed the Removal Action. Both pending causes were consolidated on appeal to the Federal Circuit.

Upon briefing and oral argument before the Federal Circuit, judgment was entered against the Petitioner affirming both decisions entered by the MSPB. Because the Federal Circuit did not directly address the first two issues presented for review herein, Petitioner filed a

"Petition for A Rehearing or A Rehearing En Banc," both of which were denied by the Federal Circuit.

STATEMENT OF FACTS

Petitioner has been employed by the federal civil service since October of 1961. He worked initially for the Federal Highway Administration, starting as a temporary GS-4 engineering aid. Just nine years later he had worked his way up to a GS-9 supervisory civil engineering technician position. During 1974, Petitioner transferred to a similar GS-9 civil engineering technician position with the Agency on the Lolo National Forest, Superior Ranger District. Petitioner's Appendix in the Federal Circuit (hereinafter "F.C. App.") at 199, and Appendix to Petition for Writ of Certiorari (hereinafter "App.") at a-2.

Petitioner was generally responsible for assuring compliance with contract specifications for roads built by purchasers of timber on the Superior Ranger District. After about a year at his new job, Petitioner, having noted numerous instances where timber sale purchasers failed to construct roads complying with contract specifications, began to call this noncompliance to the attention of his supervisors. Improper construction of roads implicated serious safety and environmental concerns. (App. a-2 -- a-3, a-7 -- a-9)

Initially, Petitioner had the cooperation of his immediate supervisor in his efforts to enforce contract specifications, but a change of supervisors resulted in a changed attitude for contract enforcement, which also resulted in Petitioner being reprimanded. Petitioner therefore filed a formal grievance on May 10, 1976, setting forth specific instances of contract violations and other irregularities in the Lolo

National Forest, and an Office of Investigation report on the grievance was requested. Though the matters raised in his grievance were substantiated by the investigation, the letter of reprimand was not removed from Petitioner's file, little action was taken by the Agency on the matters raised by Petitioner, and he was not advised of the results of the investigation at that time. (App. a-7 -- a-12)

Agency mismanagement centered mainly on: (a) violations of road construction specifications; (b) acceptance of roads which did not comply with specifications; (c) improper approval of changes in contract specifications after roads were already built (thus, any road construction work performed, whether in accord with the contract specifications or not, was routinely accepted and approved); and (d) improper approval of roads (that Petitioner had refused to accept due to incorrect construction) without even conducting a field inspection for compliance. The Agency never evaluated or corrected the mismanagement pointed out by Petitioner; instead, it ignored these deficiencies and attempted through reprisals to silence Petitioner. (App. a-7 -- a-12, a-28 -- a-31) Reprisals included reassignments, rejection of several sick leave claims, and, after 1978, adverse actions for alleged insubordination. (App. a-7 -- a-17)

In 1979, Petitioner contacted the Office of Special Counsel which requested an investigation by the Secretary of Agriculture. (App. a-3) This investigation was conducted by Thomas Beaumont (Beaumont), and resulted in the "Bergland Report" which substantiated the majority of Petitioner's charges and admitted Petitioner had suffered Agency reprisal action. Upon concluding the investigation, in a letter to the Office of Special

Counsel signed by Secretary of Agriculture Bob Bergland, the remedial action the Agency proposed was to reassign Petitioner to California. (App. a-1, a-36 -- a-39) Petitioner believed reassignment would simply be a final act of reprisal for his disclosures. He did not accept the reassignment and was removed. (App. a-1)

In a hearing in 1980, Petitioner claimed his reassignment and removal were Prohibited Personnel Practices which violated 5 U.S.C. §§ 2302 and 7701(c)(2); this contention was affirmed by the MSPB. The MSPB's Final Decision first addressed the accuracy and validity of Petitioner's disclosures and charges.

> [Beaumont] [f]inding substantial support to many of Mr. Petitioner's whistle-blowing claims, [sic] the Secretary [Bob Bergland] directed follow-up audits on these claims . . .
>
> * * *
>
> [Petitioner's] contentions regarding lack of strict compliance with the specifications of the contract on road construction and

> use were upheld as substantially correct by Inspector General auditors and Mr. Beaumont . . . (App. a-4, a-8)

Addressing the Agency's purported justification for reassigning Petitioner the Final Decision stated:

> [The Agency] approach[] to Mr. Petitioner contrasts sharply with its review of Forest Service management which shows a pattern of excusing individual actions or looking at them in isolation. Little significance was attached to such matters as management rigidly applying regulations to Mr. Petitioner while loosely observing them in all other matters, or to management's inability to support its disciplinary actions time and time again. In its April 25, 1980, letter to the Acting Special Counsel, two and one-half pages are devoted to Mr. Petitioner's proclivities while a one-liner recognizing some unwarranted actions were taken by his superiors summarized management's contribution to the devastated employment relationship.

* * *

> [There was] no evidence . . . presented [at the hearing] to show that any management official of the Forest ha[d] been removed, reassigned, reprimanded or even mildly admonished on the error of his ways or at least how to improve to avoid the same kind of acitvity in the future. Mr. Petitioner

> alone has taken the brunt of the Department's "corrective action." (emphasis added) (App. a-40 -- a-41, a-46)

The MSPB held that Petitioner had made protected disclosures, that the Agency had taken reprisals against Petitioner for these disclosures, and that the Agency's claimed legitimate personnel actions against Petitioner were substantially tainted by reprisal motive. (App. a-46, a-47) The Final Decision ordered that Petitioner's reassignment be set aside and "that the Forest Service and the Department of Agriculture cease immediately from retaliating against Mr. Petitioner . . ." (emphasis added) (App. a-47)

In February of 1982, Petitioner was reinstated to a road design job at the Ninemile Ranger District on the Lolo National Forest (Ninemile). (F.C. App. 54) Petitioner's assignment to Ninemile in 1978 was called unexplainable and held by the MSPB to be a reprisal. Petitioner's reassignment to this same job site is similarly unexplainable. Both his immediate supervisor to be, Kirk Thompson (Thompson), and the District Ranger, Jerry Covault (Covault), held considerable animosity against him. (F.C. App. 55, 181) Covault, the District Ranger at the job site at the time of both of Petitioner's assignments to Ninemile, on May 29, 1979, responding by letter to the investigation of Petitioner's charges, began by stating:

> Permit me an introductory comment on this inquiry into the contention of mismanagement of Forest Service activities.
>
> The mismanagement that should be at issue is the agency's inability to dismiss an employee [Petitioner] who is counter productive, intimidating, and obviously dedicated to misusing his position by being destructive to individuals, organization and projects.
> (emphasis added). (F.C. App. 74)

Thompson, Petitioner's immediate supervisor at Ninemile at the time of both of Petitioner's assignments, stated in a grievance filed on September 12, 1979:

> [When] I applied for the position of area engineer on the Nine-Mile Ranger District . . . I had heard from several sources that there was . . . a certain problem employee [Petitioner] . . . I was assured the problem was resolved, and the problem employee would be gone even before the selected engineer arrived on the job. . . . I was convinced the situation with the problem employee wa [sic] serious enough that I should not take the job if the employee would still be on the district or would remain there more than a couple of weeks after my arrival.
> (emphasis added). (F.C. App. 77)

Nor did Petitioner have the necessary training or experience for the road design job. Petitioner was not versed in the Agency's road design methods including its computer-aided design system. (F.C. App. 102, 179, 199, 200) Thus, the Agency had created what one MSPB hearing examiner called a "sensitive situation," (App. F-14) and when difficulties arose shortly after his reinstatement Agency officials responsible for the assignment did not intervene or conciliate.

Upon learning of Petitioner's

reinstatement to Ninemile, after consultation with Agency officials, Thompson drafted a job description with specific performance standards because he viewed Petitioner as a "_problem_" with whom he anticipated "_doing things a little differently_." (F.C. App. 195) The specific performance standard of one mile of road designed every ten work days, and was set by Thompson without even consulting any documents or prior work performance by other employees. (F.C. App. 177, 182-185)

In early March of 1982, Thompson began actions and complaints against Petitioner for not meeting this performance standard. (F.C. App. 101, 104) Petitioner responded by noting his inexperience at road design, both to Thompson and in a formal protest letter to the Secretary of Agriculture (which was copied to the Lolo Forest Supervisor, Orville Daniels (Daniels)). (F.C. App. 83-89) _No response to his_ formal protest was ever received. (F.C. App. 90) The Agency, rather than initiating or making a good faith effort to train Petitioner to improve his performance, as in the past, placed all blame on Petitioner. Thereafter, Petitioner continued to receive negative job evaluations,[1] and he continued to protest that inadequate training was adversely affecting his ability to perform adequately. (F.C. App. 105-126, 167)

Petitioner was trained entirely "on-the-job," and never received training from the Agency relating directly to his job, despite continuous negative evaluations and his correspondent requests for training. Based on events occurring in August of 1982, Petitioner was suspended for, among other reasons, his failure to timely complete a work assignment.[2] (F.C. App. 152-156) To Petitioner this action was unfair, and on his next project he documented his work progress in exhausting detail. Petitioner's records indicate a deadline being initially set by Thompson and subsequent work progress by Petitioner which would have allowed him to timely complete the projects, but necessary review of the project, by Thompson, was not completed at any time. Thompson let the work sit for months past his deadline, gave Petitioner no feedback which could be incorporated into the projects on an interim basis, and finally refused to do the review, assigning it instead to a person from another office. (F.C. App. 110-125) At the same time, Thompson refused to allow Petitioner to attend training seminar on computer-aided road design which was directly applicable to his work while allowing others on the staff to attend. (F.C. App. 119)

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[1] It is not clear from the record that Petitioner's performance was as poor as Thompson stated. One of Petitioner's co-workers, Bob Herron, stated his "progress has been very good or really good.". (F.C. App. 197-198)

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[2] After his reinstaement, Petitioner was suspended on four occasions prior to his removal in May of 1984. Respectively, these suspensions were based on his failure to use an SF-71 form to apply for sick leave, to state why he was in a local lounge for two minutes while on an absence without leave, to specifically schedule all of his restored annual leave for three years in advance, and to timely complete a work assignment and being absent without leave. Petitioner contends these adverse actions were taken in reprisal, but the specific circumstances are too voluminous to set forth herein.

Complicity of other Agency officials in refusing Petitioner relevant training also appears in the record. First, Petitioner's protest to Daniels that his lack of training and experience did not allow him to meet performance standards was never responded to by the Agency. (F.C. App. 90) Second, in 1979 an Agency supervisory engineer, Sig Stavron (Stavron), approved the witholding of Petitioner's pay increase for alleged poor performance, which action was reversed by Beaumont's investigation. (F.C. App.

164-166) Stavron again approved the withholding of Petitioner's pay increase in 1982 and 1983 while rebuffing Petitioner's objection that the action was unfair because of Thompsons's refusal to review Petitioner's work and the Agency's refusal to provide training. (F.C. App. 167) Finally, after Earl Applekamp (Applekamp) replaced Thompson, Applekamp initially agreed to train Petitioner on data input for the road design computer. However, Stavron overturned this decision and refused to allow Petitioner this training. (F.C. App. 201, 202)

In the Agency's response to Petitioner's Compliance Action, it claimed that Petitioner had received training after his reinstatement, and entered documents into the record indicating Petitioner had attended workshops in employee ethics, defensive driving, first aid and stress management! (F.C. App. 127-131) The Agency's claim that

Petitioner's training needs were adequately met by this training (while denying his wage increases for poor performance) is duplicitous. Beaumont in his testimony stated "[when] the employee is in a particular job and has a performance problem, then, you should assist the employee in dealing with the problems." (F.C. App. 212) The Agency ignored this affirmative duty knowing of Petitioner's alleged poor performance. There is no justification for this inaction after placing Petitioner in a job for which he was not trained.

In his first week of work Petitioner missed three days due to a work-related injury and was summarily placed on sick leave restrictions by Thompson.[3] Other than the few days Petitioner missed in

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3. In a 1986 claim, the Office of Workers Compensation Programs held Petitioner had proven his absence on two of these days was caused by this work-related injury. Inadequate documentation resulted in disallowance of a claim for the other day.

that first week, the stated basis for the restrictions was "prior problems with [Petitioner's] use of sick leave." (F.C. App. 81) However, Beaumont found Petitioner had not abused sick leave and a prior act of placing sick leave restrictions against Petitioner was held by the Final Decision to be an act of harassment and reprisal. (App. a-15 -- a-16) Thereby, the Agency violated the order in the Final Decision to cease reprisals.

Another controversy between Petitioner and the Agency concerned the correct form on which to apply for three days or less of sick and annual leave. The Agency insisted on the use of the "SF-71" form, (F.C. App. 99), but Agency regulations required only a proper entry on the employee's "T & A" form. (F.C. App. 100, 186, 187) However, Thompson continually insisted that the SF-71 be used. Petitioner used the SF-71 in those instances where it was required by the Forest Service Manual, and otherwise used the T & A. Thompson admitted he never even reviewed the regulation pertaining to sick leave documentation before simply ordering Petitioner to comply with his instructions. (F.C. App. 194)

The Removal Action was premised on Petitioner's failure to use the SF-71 in applying for two fifteen minute periods of sick leave. (F. C. App. 159-162) In early 1984, the Agency "ordered" Petitioner to use the SF-71 for all sick leave, even less than three days, and, when Petitioner did not obey this "order," he was removed for insubordination. At least two co-workers at Ninemile did not use the SF-71; in contrast, Petitioner was treated differently and disciplined for not using the form. (App. E-10) Further, Beaumont stated that an employee not obeying an "order" would be "insubordinate" only if the order was a proper one. (F.C. App.

207-208)

This sick leave form issue cannot be abstracted from Petitioner's prior problems with the Agency. Before his first removal, Petitioner was frequently "ordered" to disobey Agency road contract specifications and regulations. Petitioner's refusal to disobey regulations resulted in his disobeying "orders," which was then contrived to form the basis of Agency insubordination charges. Beaumont and the MSPB found that the Agency could not order Petitioner to disobey Agency regulations. However, the Agency, within the first week after Petitioner's reinstatement, again ordered him to disobey one of its regulations, i.e. the regulations pertaining to sick leave forms. The Agency's intranisgence was incredible. Running through Petitioner's whole case is the simple fact that the Agency has never admitted any error despite the fact that both Beaumont and the MSPB made explicit findings to the contrary.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. The Civil Service Reform Act Of 1978 Mandates That Whistleblowers Be Protected From Reprisals. To Effectuate This Congressional Intent, Agencies Required To Reinstate A Fired Whistleblower Must Take Reasonable And Appropriate Action To Reverse The Effects Of Reprisals And Reinstate The Employee To A Workable And Reasonable Postion. The Agency's Choice Of A Sensitive Assignment Followed By Agency And MSPB Inaction, Assured The Failure Of Petitioner's Reinstatement.

Petitioner presents this Court with an issue of exceptional, far-reaching importance, viz. in order to effectuate statutes protecting whistleblowers, must agencies, which are required to cease reprisals and reinstate a fired whistleblower, take reasonable and appropriate action to reverse the effects of reprisals and reinstate the employee to a workable and reasonable postion? Herein, the Agency selected a sensitive assignment, and through inaction in the face of numerous problems rendered the assignment unworkable and unreasonable. The Court of Appeals found against Petitioner on this issue simply by not addressing it, despite a petition for rehearing thereon.

Thi issue is also of great importance because Petitioner's substantial rights, as determined by the clear intent of Congress in passing laws requiring the protection of employees involved in protected whistleblowing activities, have been abridged. The issue is of extraordinary and far-reaching significance beyond the present case because statutory protection for employees' protected activities will be meaningless if an agency, which was required to reinstate an employee against whom it took reprisals, need have no concern that the reinstatement be fair and reasonable. By refusing to rule on this issue the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

In the Civil Service Reform Act of 1978 Congress enacted and declared a policy to protect whistleblowing employees thereby assuring integrity and proper management in the federal government.

> Often the whistle blowers's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss.
> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. . . .
> These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

Civil Service Reform Act of 1978, Report of the Committee on Governmental Affairs, United States Senate, Report No. 95-969, p. 8 (emphasis added). This statement clearly indicates that the Civil Service Reform Act was intended to protect whistleblowers. The Report prepared by members of the House of Representatives is in accord.

> Right now, a Federal employee who "blows the whistle" (sometimes even to a congressional committee) on activities at his agency which are a violation of law, abuse of authority, waste of funds or a danger to the public may be more likely to bet [sic] harassed or fired than praised or rewarded. There is no effective means other than drawn out administrative and court proceedings for a whistleblower to set things right. We all lose when reasonable and constructive criticism of agencies by those who know them best is stifled.

Civil Service Reform Act of 1978, Report, Supplemental Views By Hon. Patricia Schroeder, Report No. 95-1403, p. 386 (emphasis added). See also, *In Re Frazier,* 1 MSPB 159, 186 (1979).

Petitioner was reinstated to the same job site where he had worked just prior to his first removal. Petitioner's supervisors at this location held considerable animosity against him, and the MSPB decision ordering reinstatement held Petitioner's prior assignment to this same job site was inexplicable. Further, Petitioner's immediate supervisor testified that just prior to Petitioner's return he discussed Petitioner with his own supervisors (including Stavron), and decided that Petitioner presented a "problem" and would be treated "a little differently." Under these circumstances, the MSPB decision affirmed by Federal Circuit admitted a "sensitive situation" had been created. This is a blatant admission of Agency discrimination and bad faith.

The mandate of Congress and the statutory rights of innumerable government employees are now in jeopardy because the

Agency again removed Petitioner after he "failed" in an admittedly difficult assignment contrived by the Agency. The Agency must be charged with a duty to prepare a reasonable and functional reinstatement for the wrongfully fired whistleblowing employee lest the Civil Service Reform Act be rendered a nullity in the face of contrary Congressional intent.

Reprisals are actually a unique form of deliberate discrimination designed to injure the employee who refuses to "look thr other way" and countenance agency mismanagement and wrongdoing. Once reprisals are proven, the violation of a right has been shown, and equitable powers are proper to remedy the wrong. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971). Similar to instances of proven discrimination, Agencies which have taken reprisals have a "burden . . . today . . . to come forward with a plan [of reinstatement] that promises realistically to work *now* . . . ," *Green v. County School Board,* 391 U.S. 430, 439 (1968) (italisized emphasis in the original, underlined emphasis added).

In *Swann* this Court noted that in the face of proven discrimination "it is the responsibility of local authorities and district courts to see to it that . . . [discrimination is not] perpetuate[d]," 402 U.S. at 21, that "[w]hen school authorities present a district court with a 'loaded game board,' affirmative action . . . is proper," 402 U.S. at 28, and concluded:

> [W]ords are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern . . ."
>
> 402 U.S. at 31.

These principles apply with equal force to proven reprisal activity, when, as here, local officials fail in their duty to offer a realistic and feasible reinstatement plan, and instead present the whistleblower with a "loaded," "sensitive situation," which is designed to fail. Equity and fairness demand an affirmative, substantial remedy.

The recent circumstances surrounding the renowned Challenger space shuttle accident are particularly pertinent to this Court's consideration of the present Petition for Certiorari. Consider the following news article:

> Washington (AP) - The destruction of Challenger and the death of its seven crew members had a single cause - the failure of a seal in the space shuttle booster rocket, the Rogers Commission said today. Its report faulted NASA for operating a "silent safety" program that concealed well-documented problems from top launch managers.
>
> * * *
>
> Calling the disaster "an accident rooted in history," the Commission said of the sequence of events "began with the faulty design," a situtation worsened "as both NASA and contractor management first failed to recognize it as a problem, then failed to fix it and finally treated it as an acceptable flight risk"

> The Commission said the shuttle should not have been launched, and wouldn't have been if top-launch managers had been aware of opposition from rocket engineers who feared the effects of cold temperatures.
>
> * * *
>
> The 256-page report singled out the Marshall Space Flight Center, the facility which oversees the booster rocket program. The report said Marshall suffers from "management isolation" which needs to be eliminated "whether by changes of personnel, organization, indoctrination or all three."
>
> David Espo, Associated Press, as printed in the "Bozeman Daily Chronicle", June 9, 1986 (emphasis added).

One could ask why those persons who knew of shuttle problems did not come forward to express their concern with the solid rocket boosters. The answer, however, lies in the very circumstances of the case at bar. Persons disclosing flaws or disagreeing with management cannot expect to be protected from reprisals, even after having proven that reprisals have occurred.

This Court should grant Petitioner's request for review of his case because of the exceptional importance, now evidenced by the circumstances surrounding the Challenger disaster, of the protection of persons disclosing government waste and mismanagement. The record of this case amply demonstrates that a federal employee simply cannot rely on the letter or spirit of the law which forbids reprisals, because of the ease with which an Agency can ignore a remedial order. This Court's order and opinion definitively establishing the federal employee's right to protection from reprisals, and the agency's duty to assure such reprisals do not continue upon an employee's reinstatement after reprisals are proven, is necessary to protect the public interest and all government employees who may wish to disclose future problems or agency mismanagement. Therefore, the Writ of Certiorari should issue herein.

II. Constitutional And Statutory Due Process Rights Of A Federal Employee Require That An Impartial And Unbiased Person Preside Over And Rule At Agency Removal Proceedings, Rather Than A Person Serving Dual Roles Of Prosecutor And Judge, Who Was Also The Agency's Defeated Advocate From A Recent Action Involving The Same Employee And The Same Issues.

Petitioner contended before the Federal Circuit that he was denied basic constitutional due process in the Removal Action because the charging and deciding official at Agency removal proceedings was not only the same person, but was also the Agency's defeated advocate from the first removal action in which the Agency's removal decision was overturned by the MSPB because Petitioner proved the Agency had taken reprisals against him. The action of the Agency, in thrusting its recently defeated advocate into the role of an "impartial" decisionmaker where the very issues upon which he was defeated, viz. Agency reprisal, would again be directly at issue, was so fundamentally unfair that Petitioner was not afforded basic due process protection. The Federal Circuit resolved this issue against Petitioner simply by not addressing it, despite a petition for rehearing thereon.

Thus, Petitioner presents this Court with a constitutional issue of exceptional and far-reaching importance, viz. whether as a matter of fundamental constitutional due process an employee is entitled to an unbiased, impartial decisionmaker, capable of making a bona fide and fair decision, at the first level of an agency's disciplinary process. This Court's ruling on this issue impact on all federal employees.

The constitutional basis for requiring the decisionmaker to be impartial was succinctly stated by this Court in *Re Murchison,* 349 U.S. 133 (1954).

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. . . . But to perform its high function in the best way justice must satisfy the appearance of justice.
>
> * * *
>
> A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. *Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused*. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. *Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer*.

349 U.S. at 136 - 137 (Citations omitted, emphasis added).

In *Cleveland Bd. Educ. v. Loudermill*, _ U.S._, 84 L.Ed.2d 494 (1985), the Court emphasized the importance of assuring against erroneous decision-making by an agency during the removal of an employee. The *Loudermill* Court first balanced the interests of both parties in a pre-employment-termination hearing, and noted that the employee's great interest in maintaining his employment was beyond legal dispute and that full due process must be afforded the fired employee before he is deprived of his significant property interest in employment. Thus, the *Loudermill* Court held that pre-termination proceedings required notice and an opportunity to respond to implement "an initial check against mistaken decisions." 84 L.Ed.2d at 506. *Loudermill* did not decide whether the agency official considering an employee's response and rendering a decision must be impartial; however, if non-erroneous decision-making is to be assured, impartiality is necessary.

In the recent case of *Chicago Teachers' Union v. Hudson*, _ U.S._, 89

L.Ed.2d 232 (1986), in a dispute concerning the allocation of non-union-member dues to union activities, this Court ruled that non-union-members challenging the allocation of dues must receive a reasonably prompt opportunity to challenge the amount of dues before an impartial decisionmaker. The *Hudson* Court noted that the result was necessary because of the First Amendment rights at stake therein.

When disciplinary action is brought against a federal employee, the action effects property interests equally as crucial as union dues allocation. Also impacted in cases involving whistleblowers and agency reprisals are the employee's First Amendment free speech and petition rights. To protect the aforesaid constitutional rights a federal employee must be afforded a hearing and decision by an impartial decisionmaker, at the agency level, pursuant to the clear holdings of

Murchison, *Hudson* and *Loudermill*. Erroneous decision-making will not be avoided if an agency is free to appoint an official to serve a dual role as prosecutor and judge, and is free to appoint a blatantly biased official to enter its removal decision.

In the present case, Petitioner was denied an impartial decisionmaker at the agency level in two distinct respects which jointly operated to deny Petitioner his constitutional right to a decision by an impartial and unbiased judge before a deprivation of property occurred. First, Robert Quade (Quade), an Agency personnel specialist, was both the charging and deciding official when Petitioner's second removal was proposed. After extensive information is submitted to him, Quade brought the removal action against Petitioner by signing a "letter of charges." Petitioner was assigned an "oral reply officer" and given opportunity to respond to the charges. Quade then reviewed the charging documents, the employees oral reply, the recommendation of the oral reply officer, and made a decision on the propriety of the charges and the proposed penalty. (F.C. App. 159-162)

During initial stages Quade acted as the government's prosecuting attorney or police officer. When the hearing process reaches a later stage, Quade has changed his hat and enters the picture as judge of the charges he brought and the penalty he proposed. Quade thus acted similar to the "judge-one man grand jury" of ***Murchison*** and, in violation of ***Murchison,*** became a decisionmaker who, having prepared the charges, is not impartial.

Second, Quade was the government's losing advocate when Petitioner successfully challenged his first removal from the Agency by proving that reprisals had been taken against him because of his protected disclosures. Under *Murchison, Hudson,* and *Loudermill,* a person so recently in the position of an adversary could not, as a matter of law, be expected to set aside his adversarial role and give the present case impartial and objective consideration. This is particularly true because the present removal action involved many of the same issues of reprisal which Quade had the duty of disproving in the first removal action. As a matter of law, the basic fairness inherent in the guarantee of due process and the policy of non-erroneuos decision-making have both been violated by Quade's multiple roles in the present case. Therefore, this Court's Writ should issue and a remedial order entered.

The Federal Circuit in *DeSarno v. Department of Commerce,* 761 F.2d 657 (Fed. Cir. 1985), held that it did not violate due process for the charging and deciding official at the agency level to be the same person. Petitioner contends that *DeSarno* was wrongly decided in the Federal Circuit. The issue of a federal employee's due process right to an impartial decisionmaker in Agency removal proceedings was considered by this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), but the action resulted in a plurality opinion and a definitive opinion did not issue. The intervening enactment in 1978 of the Civil Service Reform Act, and the intervening decisions of *Loudermill* and *Hudson*, suggest the *Arnett* issue should be reconsidered and definitively decided. The present case amply demonstrates that agencies proposing an employee's removal must be required to appoint an impartial decision-maker; otherwise, the guarantee of a fair proceeding will be hollow.

Anderson did not raise the issue of Quade's non-impartiality before the MSPB. Rather, this issue was first raised in his appeal before the Federal Circuit. The

Agency challenged Petitioner's right to first raise this issue on appeal, but the Federal Circuit did not rule on the issue.

The requirement that issues not be raised for the first time on appeal is not absolute. Generally, it is held that the issue will not be barred when a pure question of law is raised and refusal to consider it would result in a miscarriage of justice. In *Hormel v. Helvering,* 312 U.S. 552 (1940), this Court stated:

> Ordinarily an appellate court does not give consideration to issues not raised below. . . . But those cases do not announce an inflexible practice . . . There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. . . . Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

The present case fits squarely within

these exceptions. Petitioner's contentions raise no issues of fact which do not plainly appear in the record. Thus, a clear issue of law has been raised. Secondly, a manifest injustice will result if the issue is not considered since Petitioner's claim is based upon a clear due process right to a fair hearing and an impartial decisionmaker. The Agency's action contravenes the legislative scheme which envisions fair and equitable personnel practices, 5 U.S.C. 2301(2), and important public policy issues affecting litigants beyond the present controversy are raised. Therefore, this Court's Writ of Certiorari should issue.

III. Constitutional And Statutory Due Process Rights Of A Federal Employee Are Violated When The MSPB Denies: (A) The Right To Obtain Relevant Evidence Through Discovery; And (B) The Right To Subpoena Witnesses. By Dismissing Petitioner's Evidentiary Requests, The MSPB Allowed The Agency To Completely Control The Record And Denied Petitioner A Fair Opportunity To Prove Reprisals Had Continued.

A basic requirement of due process is a fair trial in a fair tribunal, *Groppi v. Wisconsin,* 400 U.S. 505 (1971), *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), *Re Murchison,* 349 U.S. 133 (1954), which principle includes administrative disciplinary hearings, *Friedman v. Rogers,* 440 U.S. 1 (1979).

Petitioner contends he did not have even a semblance of a full and fair trial before the MSPB in both of the actions now on appeal, because the MSPB summarily denied him relevant discovery evidence and a hearing in the Compliance Action, and denied his subpoena request in the Removal Action.

This issue is of exceptional

importance because an aggrieved employee, upon whom the reprisal burden of proof rests, must have fair and meaningful access to relevant documents and testimony.[4] Otherwise, the MSPB hearing process will become a charade in which the agency creates a record, easily supported on appeal under the substantial evidence rule, while the employee is powerless to contest agency accusations through relevant employment documents (which are completely under agency control) or witness testimony. The facts of Petitioner's case demonstrate MSPB disinterest in assuring a full and fair forum for federal employees.

Discovery is a basic right of an appellant before the MSPB which is established by the regulations. 5 C.F.R. 1201.71-75. Constitutional due process also demands that an appellant be allowed reasonable access to information relevant to the presentation of his case; to hold otherwise would make a mockery of the MSPB system. Discovery requests must be granted where they relate to a material issue of the case, and failure to grant such discovery is plain error warranting reversal and remand. *Golden v. Dept. of Navy,* 7 MSPB 326 (1981), *Hanifan v. United States,* 354 F.2d 385 (Ct.Cl. 1965).

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[4] By order of the MSPB Board, Petitioner's allegations of repisal were heard piecemeal, rather than as a _whole picture_ of Agency action. The MSPB Board's order to consider reprisal evidence on a piecemeal basis was legally incorrect and denied Petitioner a _full_ and fair hearing of his reprisal allegations.

Petitioner's discovery request in the Compliance Action was summarily denied, purportedly because the documents were irrelevant. (F.C. App. 62-65) Yet, the Compliance Decision itself clearly demonstrates the relevancy of the request. Petitioner requested production of, among other documents, job descriptions and flexi-time requests submitted by other employees within the local Agency, to evidence that his job description was unusually specific and that he was not allowed to use his flexi-time in the same manner as other employees. Plainly, had Petitioner been able to so demonstrate disparte treatment a strong inference of retaliation would have been raised.

After the MSPB denied Petitioner's discovery request, the Agency submitted one job description and one flexi-time request for other employees. (F.C. App. 166-176) These two documents were then utilized in the Compliance Decision as proof that the Agency had no discriminatory practices against Petitioner. (F.C. App. 49, 51) The relevancy of Petitioner's discovery request was demonstrated by the MSPB's own decision. The Federal Circuit admitted the MSPB was in error by denying this discovery, but held the error was harmless. It is simply incorrect that a plain error of law can be harmless when the MSPB relied on "uncontroverted" evidence handpicked by the Agency, but wrongfully denied Petitioner any access to the whole body of such documentary evidence, which evidence could have plainly demonstrated retaliatory intent. The denial of Petitioner's discovery request is a clear violation of Petitioner's constitutional and statutory due process rights.

The Compliance Action was decided soley upon written submissions, because Petitioner's request for a hearing was denied. Thus, being denied access to the Agency's pertinent employment documents was exceptionally prejudicial to Petitioner. Petitioner was expected to prove Agency non-compliance, but could not, because he was denied both a hearing and relevant documentary evidence. Due process of law is not provided by a process that denies a party any means to prove his case.

In the Removal Action, Petitioner requested approximately twelve witnesses, all federal employees, to appear and testify in support of his case at the removal hearing. His witness request was essentially denied in full with only those witnesses requested by both the Agency and Petitioner being allowed. (F.C. App. 68-72) Such wholesale denial in a removal action of testimony relevant to the appellant's reprisal defense denies due process of law. Essentially, Petitioner had to prove his reprisal case through a series of hostile, adverse witnesses, i.e. his first and second-line supervisors and local Agency personnel officers.

Many, if not all, of the witnesses Petitioner requested would have presented testimony relevant to the propriety and reasonableness of the Agency's enforcement of sick leave procedures at Ninemile, and to the reprisal allegations made. The testimony of two witnesses denied by the

MSPB, Thomas Beaumont and Don Nelson, was particularly damaging to the Agency at the first removal action. See, App. a-3 -- a-9, a-32 -- a-33.

The Federal Circuit held that Petitioner failed to prove retaliatory intent, but did not address his further contention that he was denied any realistic opportunity to prove retaliatory intent in all MSPB proceedings. Petitioner was placed in a "no-win" situation, and has thereby been denied the fair hearing which is his right under the Due Process Clause. This Court's Writ of Certiorari should issue so that the actions of the MSPB herein, and its hearing procedures, can be reviewed and a remedial order issued.

Dated this 26th day of July, 1986.

Steven B. Ungar

CERTIFICATE OF SERVICE

I, Steven B. Ungar, a member of the bar of this Court, hereby certify that one copy of the forgoing was served upon Respondent's counsel of record before the Federal Circuit, Hillary Stern, at the Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, 20530, which is the aforesaid counsel's last known address of record and that three copies of the forgoing were served upon the Solicitor General of the United States, at the Department of Justice, Washington, DC, 20530, all as required by this Court's Rule 28, by placing the forgoing in the United States Mail postage prepaid, this 26th day of July, 1986. I further certify that all parties required to be served have been served.

Steven B. Ungar

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

ARTHUR J. ANDERSON	)	
	)	
	)	
v.	)	CASE NO.
	)	DE 07528010123
	)	
DEPARTMENT OF AGRICULTURE	)	

INITIAL DECISION

Mr. Arthur J. Anderson was employed by the U.S. Forest Service as a Civil Engineering Technician in the Lolo National Forest, located in the vicinity of Missoula, Montana. Mr. Anderson was removed on July 21, 1980, for failing to report for a directed geographic reassignment to the Klamath National Forest in northern California. The reassignment, was based on the poor working relationship Mr. Anderson had with supervisors and their employees. He challenges the legitimacy of the reasons for his reassignment and alleges that the action is but the latest of a long history of reprisal actions resulting from his whistle-blowing activities on the Lolo.

DISCUSSION

I. BACKGROUND

Mr. Anderson was employed by the Forest Service in June 1974 as a Civil Engineering Technician, GS-9, under a WAE appointment. One year later he was given a permanent appointment to the same position. During this year, there was no indication of other than satisfactory work performance and working relationships with supervisors and fellow employees. 1/ Shortly after his permanent appointment, Mr. Anderson raised questions about the enforcement of timber sale road construction contracts and the organizational difficulties occurring between foresters and engineers. These questions were soon followed by a draft letter of admonishment for unacceptable working relationships with contractors in July of 1975. Mr. Anderson and a number of Forest Service superiors have not been on good working terms since.

The difficulties between Mr. Anderson and his superiors culminated on March 20, 1979, with his proposed discharge for insubordination. Mr. Anderson protested that mismanagement and waste of funds had been going on for some time in the forest, that he had complained about it and that the proposed discharge was reprisal for his whistle-blowing complaints. The Special Counsel of the Merit Systems Protection Board, to whom these protests were directed, asked the Department of Agriculture to report on the Appellant's allegations. 2/ Action on the discharge was tabled until the report to the Special Counsel was completed. Mr. Thomas Beaumont, an Employee Relations Specialist with the Office of Personnel of the

Department, gathered all the documents bearing on Mr. Anderson's complaints and employment history and conducted an extensive investigation by interrogatory. On the basis of this material, christened "the 48-inch file" during this proceeding, he prepared the report, and recommendation signed and issued by Secretary Bob Bergland on September 19, 1979. Finding substantial support to many of Mr. Anderson's whistle-blowing claims, the Secretary directed follow-up audits on these claims, rescinded some but not all of the disciplinary actions taken against Mr. Anderson, including the proposed discharge, because they were unsupported by evidence, and directed that Mr. Anderson be assigned out of Region 1 to a transportation planning position because of the management-employee relationship which had been "rendered inoperable."

The appellant protested the geographic

reassignment. He particularly questioned being reassigned before all the follow-up audits had been completed and because Mr. Beaumont had concluded that Mr. Anderson and his superiors had rendered the work environment inoperable. The Special Counsel then asked for the factual incidents to support the conclusion about the work relationship of the appellant and his supervisors.

On April 25, 1980, Mr. Beaumont, over the Secretary's signature, replied with a list of 15 items for which Mr. Anderson was alleged to be responsible, to support the Department's conclusion that the work relationship had deteriorated. These included Mr. Anderson's use of leave, method of asking for leave, complaints about resolved matters, refusal to accept guidance, refusal to cooperate and, not the facts of his having grieved, but that his methods and attitudes as reflected in his grievances and complaints. The Department opined that these demonstrated that Mr. Anderson lacks trust in all of the managers on the Lolo National Forest. On the management side, mention was made only that some unwarranted actions had occurred. The report continued that no single blame for the situation could be found but the relationships were not salvageable and the reassignment was designed to "enable Mr. Anderson to make new work relationships based on trust and respect so that he would be able to establish a healthy work environment."

II. FINDINGS OF FACT

While only after the prehearing conference and three days of hearing on this case did I come to this conclusion, I find that the facts as found by Mr. Beaumont are not really in dispute. Indeed, many of the factual findings he made were offered by either of the parties as proposed findings of fact, albeit differently phrased. The testimony of the Department's witnesses and in some instances the appellant's witnesses, in many instances duplicated or corroborated information well documented in the 48-inch file which supported Mr. Beaumont's findings. A summary of the pertinent factual findings, which I adopt as my own, are given below. What is rigorously challenged are the conclusions Mr. Beaumont drew from these findings. Whether these conclusions are supported is discussed subsequently.

From 1975 through 1979, Mr. Anderson has persistently complained that contracts were not being enforced on road construction related timber to [sic] sales. Roads not meeting the contract specifications were accepted over his recommendation or without his knowledge. The latest incident involved a Rock Creek salvage sale in 1978. His contentions regarding the lack of strict compliance with the specifications of the contract on road construction and use were upheld as substantially correct by Inspector General auditors and Mr. Beaumont, although no management official was found to have been improperly motivated to disregard the contract.

Appellant's other inquiries during this period related to alleged safety violations, conflicts of interest, improper use of funds, cover-up of complaints and violations of travel regulations. Although his complaints on these matters were not consistently upheld, it was found that his pursuit of these matters was not unreasonable when he was never advised of the outcome of the audits or investigations. In other instances, his complaints as supplemented by Mr. Beaumont's inquiry, were scheduled for further investigation. Mr. Beaumont noted that the appellant "met resistance from his supervisors and less than complete support and information from those responsible for the general correction of these deficiencies" on the contract enforcement sales investigated in 1977. 3/

While Mr. Anderson was complaining during this period, management was taking actions with respect to his employment. In March 1976, he was relieved of his assignment as a construction inspector because he could not get along with the contractors or purchasers. Mr. Beaumont noted that there was an adversary [sic] relationship this time. Mr. Anderson would insist upon the contract being enforced. His supervisors would allow less than the contract required maintaining an amicable relationship with the contractors. Essentially, the supervisors were allowed to function in a manner about which Mr. Anderson complained and was later upheld. Mr. Beaumont found that the substance of Mr. Anderson's complaints and his attempts to attain contract compliance were the cause of his being relieved of his assignments in March 1976 and being on a successive series of details for two years thereafter.4/ For the first of his two years on detail, it was also conceded that Mr. Anderson did not have any meaningful assignment. In 1977, he was put in a transportation planning position in which he performed satisfactorily and had no significant problems with his superiors.

Although advised that he would not see construction inspector duties again until he changed his ways, Mr. Anderson was reassigned to a construction inspection position following a reorganization of the Forest in 1978. Mr. Beaumont could find no reason to explain such a move, particularly when the appellant had been performing satisfactorily in transportation planning. He conceded that this reassignment was at least partially based on Mr. Anderson's previous activities and complaints; however, he rejected the idea that it was for reprisal and suggested that the action was motivated "simply (by) a desire to move someone who was not part of the team approach."5/

Not only was Mr. Anderson's position assignment kept up in the air for two years, he was also subjected to a series of disciplinary actions during this time. Shortly after his first complaint in 1975, he was reprimanded for his adverse relationships with purchasers. This reprimand led to the changed assignment under the details. Two reasons were offered in the reprimand, the first, in effect, insisted that he was being insubordinate by enforcing the contract specifications as he was supposed to and not deal inflexibly with the purchasers as everyone else was doing. This reason was held improper by Mr. Beaumont. The second reason, failure to follow instructions in regard to other work assignments, was upheld.

While on detail, Mr. Anderson was not disciplined for anything. In March 1978, two months after his assignment to the Nine Mile District on a construction inspector job, he was admonished for writing a seven-line memo to his superior instead of following the less formal process of resolving things orally. When the admonishment was challeged, it was rescinded on the basis that Mr. Anderson had the right to document a simple disagreement with his supervisor, although he appeared to be questioning the decisions of his supervisor at every opportunity and rapport between them was lacking.

Somewhat later in the year, Mr. Anderson was suspended for insubordination. He refused and continues to refuse to answer about a telephone conversation in April 1978 on a government telephone. This suspension stands.

In June of 1979, Mr. Anderson argues that he was threatened with a suspension for preparing a letter to Orville Daniels, the Forest Supervisor concerning the undermanning of the Rock Creek sale. Nothing came of the threat; however, it was noted that the supervisor regarded an employee's questioning his instructions to be insubordination. A second suspension was taken in November 1978 for insubordination and neglect of duty. The supervisor verbally ordered Mr. Anderson to construct Y approaches on the Rock

Creek sale. Since this was in violation of the manual instructions, Mr. Anderson refused to do so unless the direction was put in writing. He argued that he had no authority to change the intersection and that it was not a proper order. Mr. Anderson's stand on this matter was supported and this suspension was rescinded.

The proposed removal which precipitated his contact with the Special Counsel, was prompted by the appellant's refusal to accept and read all official correspondence unless it was directed to his representatives. He was also directed to prepare a summary of why he had taken a certain action. He submitted a letter but this was not considered a summary and therefore he was held to be insubordinate. Mr. Beaumont found that these instances of insubordination might be technically sustainable but would never rise to the level warranting termination. Consequently, the proposed discharge was rescinded.

Other disputes were occurring between Mr. Anderson and his superiors over evaluations, leave, change in duty hours, the submission of doctor's certificates to cover sick leave, and other miscellaneous matters. In some instances Mr. Anderson's viewpoint was upheld; in others, his superior's viewpoint was. Some of the grievances that Mr. Anderson did file were rather petty and completely unsupportable. For instance, he insisted that the agency give him administrative leave to cover personal business which he would have been able to handle without leave had he attended a training course which had been cancelled. In other instances, management reacted in a similarly petty manner. After being advised that his insistence upon a sick leave certificate had not been appropriate, his supervisor insisted on renewing the instruction, which even Mr. Beaumont characterized as harassment of Mr. Anderson. Repeatedly, Mr. Beaumont comments that Mr. Anderson and his supervisors contributed to an environment that led to confrontation. He stated many of these situations were initiated by Mr. Anderson and responded to by an application of the regulations albeit a rather rigid application. 6/ In sum, Mr. Beaumont expressed the finding with which I cannot disagree:

> It is apparent in the record, particularly from Mr. Anderson's individual comments, that he does not trust his supervisors and is in a continual position of doing battle with his supervisors rather than working with them. It is also readily apparent that Mr. Anderson's supervisors for the past year were also noncompromising and made a situation a win-lose or either-or situation. In addition, previous actions taken in regard to continually reassigning and detailing Mr. Anderson were motivated by some improper considerations. Both supervisory personnel and Mr. Anderson

infringed upon the proper management-employee relationship. 7/

III. THE APPLICABLE LAW

A discharge of an employee may be taken only for such cause as will promote the efficiency of the service. 8/ An agency's decision to discharge will be upheld only if it is supported by the preponderance of the evidence. 9/ The Board has held that to meet this burden, the agency must support each and every element of the case by the preponderance of the evidence. 10/ What those elements are and how the burden of proof may be met in a discharge case resulting from a geographic reassignment were addressed by the Board in the decision of Ketterer v. Department of Agriculture, MSPB Order No. SL075299021 (July 2, 1980). The Board held that proof that a removal promotes the efficiency of the service "necessarily includes a demonstration that the agency's decision to reassign the employee was a bona fide determination based on legitimate management considerations in the interests of the service. [sic] 11/ The agency must make out a prima facie case by showing that the employee had adequate notice of the decision to reassign and refuses to accept the reassignment, and by presenting some evidence of legitimate management reasons prompting the decision to reassign. If the agency satisfies this burden, the appellant must come forward with credible evidence that is sufficient to cast doubt on the existence of any legitimate management basis for the reassignment. Should the appellant do this, the agency must come forward with further evidence relating the reassignment to the efficiency of the service. 12/

In this case, Mr. Anderson has raised the claim that the reassignment is a prohibited personnel practice under 5 U.S.C. §2302(b)(8) because the Department reassigned him for reasons which are tainted by reprisal for whistle-blowing on mismanagemant by the Forest Service. Even if the Department was able to show by the preponderance of the evidence that the appellant's discharge promoted the efficiency of the service, its decision could not be upheld if the appellant was able to show that the decision was based on a prohibited personnel practice. 13/ This is an affirmative defense upon which Mr. Anderson bears the burden of proof. 14/

The elements of proof on a reprisal for whistle-blowing were discussed in the Board's decision in Frazier v. Hall, MSPB Order No. SCC-80-1 (December 17, 1979). To establish reprisal for whistle-blowing under Frazier, the appellant must have made protected disclosures of mismanagement, waste of funds, etc. For the protections to attach, the appellant must show that he held a reasonable belief that the disclosures of information evidenced mismanagement or waste; the appellant must next show that retaliation resulted. This includes a demonstration that the protected disclosures were known to the management officials taking action and that there is a retaliatory motive which can be inferred from the circumstances surrounding the action. 15/

As discussed below, the facially legitimate management reasons offered to support the reassignment of Mr. Anderson are intertwined with adverse reactions by management officials to his whistle-blowing and other complaints. Therefore, a crucial issue is what proof is necessary to show a prohibited practice when mixed motives for the agency action are evident. The Board did not discuss this issue in Frazier in relationship to reprisal for whistle-blowing since the evidence in that case failed to support a finding that the manager who took the actions at issue knew of the employees' protected disclosures. However, the Board addressed the question of mixed motives in analyzing the reprisal for exercise of appeal rights issued in Frazier. 16/ Since the Board's analysis on this point was based on a review of analogous statutes, such as Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act, all of which contain provisions designed to protect the integrity of the complaining process, I find the Board's holding on the mixed reason issue in an exercise of appeal rights case to be applicable to the reprisal for whistle-blowing issue in this case.

The Board noted the cases which held that if a prohibited reason in any way played a part in the action, the whole action was tainted. It also noted the more stringent view, that the prohibited reason must play a dominant or primary part in the decision to render the action illegal. It adopted neither of these approaches, but fashioned a "significant factor" criteria which was not specifically defined. 17/ In the context of the Board's analysis, I find the "significant factor" approach to require a showing of influence over and above a de minimus level, yet not reaching a dominant motive level. This comports with the Board's later holding in the case that mere knowledge of protected activity will not support an inference of retaliatory motive. 18/ If, then, the appellant can show that his protected activity had a significant influence on the Department's decision to reassign him, he succeeds in supporting a finding that a prohibited personnel practice of reprisal for whistle-blowing occurred in this case.

The Department argues that the analysis of the evidence should not stop at this point but be considered further under the holding in Mount Healthy City School District v. Doyle, 429 U.S. 274 (1977). Under Mt. Healthy, should the appellant show that reprisal was a significant, or even a substantial, factor in the reassignment decision, the Department may still support the reassignment if it is able to show that the action would have been taken anyway for reasons independent of the protected activity. The Board acknowledged in Frazier that the Mount Healthy argument could be raised, but did not decide its applicability to a prohibited personnel practice case. 19/

Mount Healthy dealt with constitutionally protected free speech activity, consideration of which was a substantial and impermissible reason in the district's decision not to rehire Doyle. The Supreme Court held that to limit analysis of the case to the rule of substantial causation could place an employee in a better position as a result of the protected activity than he would otherwise have been and require his reinstatement even if the same decision would have been reached apart from the protected activity. It held that the constitutional principles were vindicated if the employee is in no worse a position than if he had not engaged in the conduct.

I find that once the appellant shows that his protected activity as a whistle-blower played a significant part in the Department's decision, the analysis should proceed, as the Department argues, to the independent reason test of Mount Healthy. Whistle-blowing has the trappings of the free speech activity at issue in Mount Healthy. There is nothing in the Reform Act which suggests that whistle-blowing carries greater protections than free speech. Rather, as discussed by the Board in the Frazier decision, the Reform Act contains the "complimentary, but sometimes countervailing" purposes of protecting whistle-blowers while improving the efficiency of the service by facilitating the removal of employees who do not perform acceptably. 20/ The Mount Healthy test is an appropriate means of striking that balance. In this respect, the Department argues that its evidence shows that the appellant had poor working relationships apart from his protected activities and that these present an independent reason which would support his reassignment.

Alternatively, the Department maintains that it can support the reassignment, under the theory advanced in Hernandez v.

Alexander, 607 F.2d 920 (1979). In Hernandez, the court held that there comes a point when protected activity pursued to a great extent in continuing resistence to an agency or an agency action, may take the protected activity out of the coverage of the usual retaliatory standards and become a realistic factor in assessing an employee's ability to perform where he is. The Department argues that Mr. Anderson's complaints, grievances and allegations of reprisal have reached that point to present a legitimate management reason for ordering his reassignment to another region.

III. ANALYSIS

Upon receipt of Secretary Bergland's September 19, 1979, report, Mr. Anderson was on notice that he would be reassiged [sic] out of the region. In a directive dated January 11, 1980, Mr. Daniels advised the appellant of the specific location and of his February 24, 1980, reporting date. He received this directive on January 16, 1980. On February 22, 1980, Mr. Anderson declined the reassignment and he did not report for duty at the Klamath National Forest on February 24, 1980. The legitimate management reason offered all along by the Department to support the reassignment was the adversarial relationship between Mr. Anderson and his supervisors, which was of a long-standing nature. As I have noted above, the adversarial relationship was supported by the September 19, 1979, report, the summary attached to it and the grievances and complaints, all of which were well documented in the 48-inch file. While the parties do not agree on the causes or the accountability for the relationship, it does exist; its existence is sufficient evidence to establish a prima facie case under Ketterer supporting the reassingment.

The appellant's challenge to the legitimacy of this reason for reassignment rests on his reprisal for whistle-blowing claim. He asserts that the adversarial relationship at least in part was prompted by impermissible reaction to his complaints on the part of management. It was stipulated that Anderson made protected disclosures of mismanagement and waste of funds. It was precisely Secretary Bergland, Mr. Beaumont, any intervening Department officials and local Forest Service officials once Mr. Anderson's claims concerning the Rock Creek sale hit the newspapers on October 20, 1978. It was not stipulated and is now contested that local Forest Service officials knew of protected disclosures before 1978, and could, therefore, be held accountable for reprisal action or any taint to the working relationship. The lack of knowledge by local officials of protected activity is unsupported by the evidence. The first grievance Mr. Anderson filed on March 10, 1978, clearly protests "fiscal irregularity," "lack of contract enforcement, "lax contract administration." This grievance followed informal resolution attempts with local officials on the letter of reprimand, which was directly concerned with Mr. Anderson's contract relationship with contractors and his reassignment for his attempted contract enforcement activities. It resulted in an Inspector General inspection sometime later.

Mr. Anderson may not have used the magic word "whistle-blower" but the substance of his complaints dealt in great part with whistle-blowing type activity. Substance, not the invocation of magic words, carries the protection of the Act. Early on, then, Mr. Anderson's immediate supervisors had actual knowledge of protected disclosures, even if the label, "whistle-blower," had not been affixed to Mr. Anderson's activities yet. 21/ The Department makes the indirect suggestion that since Mr. Anderson's disclosures were only in the Forest Service or made to local officials before 1978, he was not really protected. Although the Board did not specifically address this point in the Frazier decision, such a narrow reading of the provisions of 5 U.S.C. §2302(b)(8) would not be consistent with the Board's holding in Frazier that the remedial aspects of the statute require broad reading. 22/ The whistle-blowing section of the Act contains no such restriction. Moreover, Mr. Anderson's concerns were brought to the attention of the IG was early as 1977 and this is clearly protected by subsection (8)(b). 23/ I conclude the appellant has shown that from about the time he started making protected disclosures, local Forest Service officials were aware of them.

The appellant must next show that Department officials acted with a retaliatory motive. As noted above, there were consistent findings that a lot of the actions taken by local officials with repsect to Mr. Anderson's position assignments and discipline and, to some extent, the handling of his grievances, were in part prompted by the reaction to his complaints. Mr. Beaumont rejected reprisal as a motivation, however, since under his theory management officials were not aware of the protected disclosures, a conclusion on which I have made a contrary finding. There is, as the appellant argues, a coincidence in time between the complaints and the disciplinary actions or details taken against Mr. Anderson. Whereas in many other matters, management was notoriously loose in its observation of rules, regulations and policies, when it came to dealing with Mr. Anderson, it assumed a "rather rigid" approach. Mr. Robert Peterson, another construction inspector, encountered similar difficulties with his superior over attempts to enforce the contract. After insisting upon contract compliance, he received an evaluation substantially below that which he had ever been given. It was later raised on a grievance. Mr. Peterson testified that his supervisor told him many times not to enforce the contract as written. Mr. Donald Nelson met at some unspecified time with the Chief of the Forest Service and testified that he was told not to associate with Mr. Anderson, who had been a troublemaker for 10 years.

Mr. Peterson's and Mr. Nelson's testimony reveal a propensity on the part of some Forest Service officials to react adversely to those who question their management. The coincidence of Mr. Anderson's complaints and the subsequent discipline and the manner in which the Forest Service dealt with Mr. Anderson, support a finding that reprisal by local management officials played a part in creating the adversarial relationship upon which Mr. Anderson's reassignment was based.

The Department makes a telling point when it notes that the Forest Service did not make the decision to reassign Mr. Anderson. The Department did. There is no evidence that Mr. Anderson or any Department official shared an adversarial relationship. Mr. Beaumont testified that he never dealt with Mr. Anderson before to his recollection. There is not sufficient evidence to conclude that Secretary Bergland, Mr. Beaumont or any of the intervening Department officials participated in direct reprisals against Mr. Anderson. Nonetheless, even if they chose not to regard it as reprisal, Mr. Beaumont and the Secretary knew of the reaction of management to protected type activity, acknowledged that reaction contributed to the adversary relationship, and relied on the adversary relationship to reassign Mr. Anderson. That adversary relationship was in part due to reprisal for whistle-blowing. Their reliance on a tainted reason for the action tends to perpetuate the reprisal. Thus, while these individuals may not have formed an intent to take reprisal action against Mr. Anderson, I find a retaliatory motive has not been eliminated from the decision since they relied heavily on tainted reasons to support the reassignment.

The Department all along and lately the appellant have conceded that there was an adversarial relationship between Mr.

Anderson and management to which both parties at various times contributed. Mr. Anderson was less than politic in handling of some of his grievances. Management reacted to his construction compliance complaints with shifts in his position assignment and discipline. Neither party has clean hands in this case. When management had legitimate reasons for acting, the question is whether the prohibited reasons played a significant part in the action at hand. The Department bases its reassignment decision on this adversarial relationship. Yet, even after its extensive investigation, the Department could not distinguish whether Mr. Anderson or management were mnore accountable for the deterioration of that relationship. I do not believe it necessary to decide who is accountable for the deterioration. Even were I to find Mr. Anderson responsible, this would not justify management taking reprisal action against him. Since both parties contributed to the adversarial relationship and management's contribution was tainted by reprisal, I cannot dismiss reprisal as an insignificant factor in the reassignment decision.

The Department may still support the action if it can show that it had independent reasons for making the reassignment. In this regard, the Department argues that the record amply demonstrates a pattern of dealing with others, including those outside the supervisory chain, in which Mr. Anderson refuses to follow instruction, makes unwarranted accusations and indulges in vulgar name calling. The types of activities are best exemplified by the listing in the April 25, 1980, response to the Acting Special Counsel describing the factual incidents that support that the management-employee relationship has been "rendered inoperable":

1. Mr. Anderson repeatedly characterized his supervisors and coworkers as incompetent, inept and unethical.

2. Mr. Anderson complained in 1979 about safety violations on the Cedar Creek Road on September 25, 1975, that he knew had been previously handled administratively.

3. Mr. Anderson took leave on short notice on days when inspections were planned or necessary on the Rock Creek sale, necessitating the performance of the tasks by others.

4. Mr. Anderson then complained about the actions taken by those who replaced him.

5. Mr. Anderson established the practice of taking leave by merely informing the supervisor he was on leave, and not by requesting approval of leave in advance.

6. Mr. Anderson used considerable amounts of sick leave and on one occasion, was found in Forest Service offices conducting apparent personal business during time for which he attempted to claim sick leave.

7. Mr. Anderson established a practice of notifying the Forest Service of his desire and intent to use annual leave at the last minute.

8. In filing injury claims, Mr.

Anderson refused to cooperate by completion of the proper form.

9. When difficulty on his injury claims subsequently ensued due to the form filing question, Mr. Anderson filed grievances alleging lack of proper supervisory assistance.

10. Mr. Anderson refused to accept guidance on using the negotiated grievance procedure in 1977, unnecessarily turning most of the paperwork on the grievance to the question of procedures rather than the merits of the matter, particularly after most of his concerns were resolved at the informal stage.

11. Mr. Anderson continually raised minor work concerns to the attention of the Forest Supervisor, several layers of supervision removed from him. He objected when he was instructed to deal with the questions informally with his supervisor first. Subsequently, when he was asked to put his grievance A9-1 formally in writing at the informal stage, he complained that this was reprisal.

12. Mr. Anderson filed a considerable number of formal grievances over small questions of leave and travel advance administration. The number and nature of the grievances signified a communication/confidence gap between Mr. Anderson and his supervisors.

13. Mr. Anderson did not fully cooperate with his supervisors in either requesting sick leave or documenting it as requested due to its length.

14. Mr. Anderson demanded that all correspondence of an official nature, to him, be sent to his Congressional representative. Material sent to Mr. Anderson was forwarded by him, apparently, unopened, to his Congressional representative.

15. Mr. Anderson demanded that instructions on even the most routine and single task be placed in writing for him.

Interestingly, many of these items were pulled out of context from the September 1979 report in which Mr. Anderson's activities were characterized as understandable. For example, his practice of notifying his supervisor of use of annual leave at the last minute was a practice which had been tolerated for sometime and for which Mr. Anderson had been disciplined without any notice that the practice had to be changed. 24/ Mr. Anderson's turning grievances into a question of procedure rather than merit was something of which management was also culpable. 25/ For Mr. Anderson to fully cooperate with his supervisors in requesting sick leave and documenting it, he would have had to report for work to say he was sick, which the Department held to be unreasonable. 26/ In any event, the matter cited by the Department as its "independent" reasons for reassigning Mr. Anderson are still intertwined with his protected activity, were already the subject of discipline, or were not considered so significant when they occurred as to warrant some type of action by management staff that was none too reluctant to discipline Mr. Anderson on other matters. Moreover, the Department has consistently stated that while Mr. Anderson in many of his individual complaints was supported, its action is based on the pattern of his activity. This approached to Mr. Anderson contrasts sharply with its review of Forest Service management which shows a pattern of excusing individual actions or looking at them in isolation. Little significance was attached to such matters as management rigidly applying regulations to Mr. Anderson while loosely observing them in all other matters, or to management's inability to support its disciplinary actions time and time again. In its April 25, 1980, letter to the Acting Special Counsel, two and one-half pages are devoted to Mr. Anderson's proclivities while a one-liner recognizing some unwarranted actions were taken by his superiors summarized management's contribution to the devastated employment relationship. Recognizing that the September 1979 report and the April 25, 1980, letter to the Acting Special Counsel were prepared essentially in anticipation of proceedings on Mr. Anderson's case, I find reason to believe Mr. Anderson's activities may have been exaggerated and management's toned down. Since many of the reasons still relate to protected activity as a whistle-blower of [sic] agrievant and those which don't carry little weight, I find the Department has not shown by the preponderance of the evidence that it had an independent reason for reassigning Mr. Anderson.

The Department's final attempt to support its reassignment decision relates to what it calls Mr. Anderson's excessive grieving." It maintains that under the Hernandez decision, Mr. Anderson's constant resort to the grievance procedure removes him from the realm of protected activity. It contends that it has the right to be justifiably incensed when Mr. Anderson uses the grievance procedure solely out of opposition to management decisions and this excessive use results in a relationship fraught with contention. A finding that protected activity at some point loses its protection should be cavalierly made. While Hernandez does not expressly say so, I regard the decision as requiring some clear abuse of the process before the activity is removed from the realm of protection. Admittedly, Mr. Anderson has filed some silly grievances. For instance, I am puzzled on what basis he expected the Department to underwrite his personal business with administrative leave when a training course was cancelled at the last momnent. However, many of Mr. Anderson's grievances and complaints, particularly those on more significant issues, were upheld at least in substantial part. In those instances when he raised matters again and again, the reptition was explained on a few occasions by the Forest Service not advising him of the results of his first complaints. He was also receiving inconsistent instructions on the use of the grievance system. At one point he is told to deal informally before pressing a grievance. At another, he is told to write everything down. Sometimes he resorted to the grievance procedure to cover himself when he had the choice between "a rock and a hard place," e.g., charges of insubordination for refusing to compromise on contract specifications or potential charges of unacceptable performance were he to do so. It is difficult to imagine how an employee can be said to be filing too many complaints when he is upheld on so many of them. Moreover, no one disagrees that an employee has to be right all the time in his complaints. Each employee has the leeway for a few wrong calls. There is no doubt that a lot of time was spent on handling Mr. Anderson's grievances and that this interfered with getting to the main mission of the Forest. The evidence also shows, however, that on a number of occasions when Mr. Anderson was not satisified with the results of his first complaint and pressed for additional inquiry, he was frequently upheld when that second inquiry occurred. This, too, may have contributed to his raising matters over and over. The substance of his complaints and these factors which contributed to their reptition persuade me that no clear abuse of the process has been found.

There is another factor in the Hernandez case which is not present here. Not only was Mr. Hernandez reassigned when he abused the complaint process, but the manager who had contributed to their adversary relationship was also reassigned. In the Frazier case, one of the supervisors who was responsible for the aura of conflict or reprisal was also moved. Other managers were specifically instructed on the steps to be taken to improve the management of the office and avoid a repetition of the events occurring in that case.

Throughout this case, Mr. Anderson and the management officials have been held responsible for their deteriorating working relationship. While the Forest Service was directed to look into training or discipline of management officials involved in the adversary relationship, no evidence was presented to show that any management official of the Forest has been moved, reassigned, reprimanded or even mildly admonished on the error of his ways or at least how to improve or avoid the same kind of activity in the future. Mr. Anderson alone has taken the brunt of the Department's "corrective action."

Since reprisal was a significant factor in the aversarial relationship and thus tainted the decision to reassign, and since a reason apart from protected activity was not shown to support the reassignment, I conclude that the appellant has demonstrated that a prohibited personnel practice under 5 U.S.C. § 2302(b)(8) formed a basis for the reassignment decision. This is sufficient under the Ketterer decision to challenge the legitimacy of the management reasons for the reassignment, a challenge which the Department has not overcome. Thus, I conclude that the reassignment has not been supported by the preponderance of the evidence and would, therefore, not promote the efficiency of the service.

V. [sic] CORRECTIVE ACTION

It is ordered that the involuntary reassignment of Arthur J. Anderson to Region 5 be set aside. It is further ordered that the Forest Service and the Department of Agriculture cease immediately from retaliating against Mr. Anderson for his protected activities.

This is an intial decision and order.

It will become a final decision and order of the Merit Systems Protection Board on December 15, 1980 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

An appropriate official of the agency must furnish this office with evidence of its compliance with this order within fifteen calendar days of the date the decision and order became final.

Any party to the proceeding, the Director of OPM, and the Special Counsel may file a petition for review. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

> (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than December 15, 1980. Three copies of the petition must be filed with the Secretary.

A petition for judicial review of a final Board decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

/s/

Jacqueline R. Bradley
Presiding Official

Date: November 10, 1980

1/ 5 U.S.C. §7513.

2/ 5 U.S.C. §7701(c)(1)(B).

3/ In re William Van Sciver.

4/ MSPB Order No. SL075299021 (July 2, 1980).

5/ Ketterer, at 4 citing McClelland v Andrus, 606 F.2d 1278, 1291 and note 61 (D.C. Cir. 1979).

6/ Ketter, at 5-6.

7/ 5 U.S.C. §7701(c)(2)(B).

8/ 5 U.S.C. §7513.

9/ 5 U.S.C. §7701(c)(1)(B)

10/ In re William Van Sciver.

11/ Ketterer, at 4, referencing McClelland v. Andrus, 606 F.2d 1278, 1291 and note 61 (D.C. Cir. 1979).

12/ Ketter, at 5 - 6.

13/ 5 U.S.C. [§]7701(c)(2)(B).

14/ 5 C.F.R. §1201.56(b)(2) (1980)

15/ Frazier, at 36.

16/ Such reprisal is a prohibited personnel practice under 5 U.S.C. §2302(b)(9).

17/ Frazier, at 54.

18/ Frazier, at 56.

19/ Frazier, at 56, footnote 52.

20/ Frazier, at 1, footnote 1.

21/ Since the disclosures were being made in the context of a grievance, known protected activity under 5 U.S.C. §2302(b)(9) might also be asserted.

22/ Frazier, at 46, footnote 37.

23/ See footnote 21 supra

24/ Government's Exhibit D, pp. 85-86.

25/ Government's Exhibit D, p. 92.

26/ Government's Exhibit D, pp. 94-95.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ARTHUR J. ANDERSON,)
)
v.)
)
DEPARTMENT OF)
AGRICULTURE,)
)

OPINION AND ORDER

Appellant, a Civil Engineering Technician, GS-9, for the Lolo National Forest, Department of Agriculture ("Agency") in Missoula, Montana, was reassigned to the Klamath National Forest in Northern California. Appellant did not accept the reassignment, and on July 21, 1980, he was removed for failing to report for a directed geographic reassignment.

Appellant appealed the agency's removal action to the Board's Denver Field Office where he alleged that the reassignment was in reprisal for his whistleblowing activities.1/ After a three-day hearing, the presiding official, in an initial decision dated November 10, 1980, found that reprisal was a "significant factor" in the reassignment and that no independent reason for the action was shown. The agency was ordered to cancel appellant's reassignment and to cease retaliating against him.2/ The agency filed a timely petition for review alleging that the initial decision is based upon an erroneous interpretation of statute or regulation, 3/ and appellant responded in opposition.

The petition for review is GRANTED.

The agency alleges that the initial decision in this case is based upon the presiding official's erroneous interpretation and application of the law, as well as several procedural errors. Specifically, the agency argues that: (1) reprisal was not demonstrated as a motive by a preponderance of the evidence; (2) reprisal was not determined to be a "significant factor" in the reassignment; (3) the agency had a valid independent basis for reassigning appellant; (4) appellant's reassignment was the agency's only alternative under the circumstances of this case; (5) the presiding official failed to state the bases and reasons for each finding of fact and conclusion of law; (6) the presiding official failed to give proper consideration to the Special Counsel's report resulting from his investigation of appellant's allegations; and (7) the presiding official's disqualification of Thomas Beaumont, an agency official, as a technical advisor or co-representative of the agency was harmful error.

Appellant contends that the presiding official applied the proper legal standards, and that the record supports the presiding official's finding that the agency action was taken in reprisal for whistleblowing. He also argues that the agency's alleged independent reasons for the reassignment were inadequate; that the agency had laternatives to reassignment; and that disqualification of the agency official as a representative or technical advisor was proper.

In Ketterer v. Department of Agriculture, 4/ the Board held that on appeal of a removal resulting from failure to accept a geographic reassignment the agency must prove by the preponderance of the evidence that its decision to reassign the employee was a bona fide determination based on legitimate management considerations. 5/ Nonetheless, the action may not be sustained if the employee shows that the reassignment was based on a prohibited personnel practice. 5 U.S.C. § 7701(c)(2).

Here, appellant clearly engaged in disclosure protected under 5 U.S.C. §

2302(b)(8) and reasonably believed that the disclosures evidenced mismanagement and waste of funds. The presiding official correctly found that agency officials were aware of the protected disclosures when they were made. The testimony of apellant and his witnesses conflicted with that of the agency officials as to their motives for reassigning the appellant. The presiding official, however, found appellant's evidence more credible than that of the agency and determined that reprisal was a "significant factor" in the reassignment. 6/ She also found that the agency had not established that it had an independent reason for the reassignment. Based upon a careful review of the record, we find that the presiding official's determinations are sound. 7/

The agency further argues that the initial decision is based on several procedural errors. None of these positions is well taken. The agency alleges that the presiding official failed to state the basis for each finding of fact and conclusion of law in the initial decision. It is evident from the initial decision, however, that the presiding official carefully considered the issues presented in this case, and made findings of fact and conclusions of law on all material issues of fact and law presented in the record as required by the Board's regulations. 8/

The agency's argument that the presiding official failed to give proper weight to the Special Counsel's report is also without merit. In Frazier, supra, we held that we are not bound by the findings of the Special Counsel. Moreover, the initial decision shows that the presiding official did consider the Special Counsel's report. 9/

The agency's final argument 10/ is that the presiding official's disqualification of Thomas Beaumont 11/ as a representative or a technical advisor to the agency subsequent to his testimony at the hearing resulted in harmful error. The Board's regulations provide that a party may challenge his opponent's representative on the grounds of conflict of interest or conflict of position. 12/ The Board finds no error in the presiding official's order disqualifying Mr. Beaumont as either a technical advisor or a representative of the agency in response to the appellant's motion. 13/ Moreoever, the record clearly shows that the agency was adequately represented and that it has failed to show that the presiding official's disqualification of Mr. Beaumont affected his substantive rights.

Accordingly, the initial decision of the presiding official is AFFIRMED as modified to cancel the removal action.

The agency is hereby ORDERED to submit written verification of its compliance with this Order to the Office of the Secretary of the Board within twenty (20) days of the date of this Order. In the event of agency non-compliance, a petition for enforcement may be filed with the Denver Regional Office pursuant to 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD;
January 18, 1982

/s/

Washington, D.C. Herbert E. Ellingwood

1/ These activities and the events precipitating his reassignment are set out in the initial decision.

2/ The presiding official did not specifically reverse the removal action for failure to accept reassignment which was the subject of Anderson's appeal; rather she only reversed the transfer of appellant initiated by the agency.

3/ Under 5 C.F.R. § 1201.115(b), this Board may grant a petition for review when it is established that the decision of the presiding official is based on an erroneous interpretation of statute or regulation.

4/ 2 MSPB 459 (1980).

5/ When the agency makes out a prima facie case by presenting some evidence of legitimate management reasons for the decision to reassign, and by showing that the employee had adequate notice of the decision and refuses to accept the reassignment, the burden shifts to the appellant to come forward with credible evidence sufficient to cast doubt as to the existence of any legitimate management basis for the reassignment. If appellant does so, as here, the agency must produce further evidence relating the reassignment to the efficiency of the service to meet its burden of proof. id. at 462-463.

6/ When questions of credibility are presented, we must necessarily give due deference to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses. Weaver v. Department of Navy, 2 MSPB 297 (1980).

7/ Since the agency's evidence failed to establish that appellant's reassignment was ordered for bona fide management reasons, it obviously fell far short of a showing that, even if retaliation played a substantial part in the decision, the agency would have taken the same action in any event for legitimate reasons. See Joan E. Gerlach v. Federal Trade Commission, No. DC7528010020, Dec. 15, 1981.

8/ See 5 C.F.R. § 1201.111(b)(1)

9/ See Initial Decision, at 1 and 2.

10/ Although other issuses are raised by the agency in its petition, we need not address them since their resolution would not affect the outcome of this case.

11/ Mr. Beaumont was an employee relations specialist with the Office of Personnel, U.S. Dept. of Agriculture.

12/ 5 C.F.R. § 1201.31(b).

13/ See presiding official's Order dated October 2, 1980, which details the reasons for Mr. Beaumont's disqualification as a technical advisor or a representative for the agency on the grounds of conflict of interest. As noted by the presiding official, Mr. Beaumont is an attorney and the Code of Professional Responsibility clearly prohibits an attorney from being both a witness and a representative.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

ARTHUR J. ANDERSON)
)
)
v.) CASE NO.
) DE07528010123
) ADD
)
DEPARTMENT OF AGRICULTURE)

INITIAL DECISION ON COMPLIANCE

Appellant, a Civil Engineering Technician, GS-9, for the Lolo National Forest (agency), Missoula, Montana, filed an appeal from the action of the agency in removing him from his position on July 21, 1980. On November 10, 1980, the Board's Denver Regional Office issued an Initial Decision finding that appellant's removal was in retalliation [sic] for his "whistleblowing" activities and, thus, a prohibited personnel practice. That initial decision ordered the retroactive cancellation of appellant's removal. Reconsideration was subsequently requested by the agency and on January 19, 1982, after reopening the case, the Board issued an Opinion and Order affirming the Initial Decision.

On May 28, 1982, appellant submitted a Petition for Enforcement, arguing that since his reinstatement he has continued to suffer harassment and reprisal. Specifically, appellant argues that in taking the following actions the agency has failed to comply with the Board's reinstatement order: (1) upon his reinstatement, appellant was assigned to a position at the Ninemile Zone, some 32 miles (one-way) from Missoula; (2) appellant was required to obtain a doctors leave slip for sick leave; (3) appellant's use of annual leave was restricted; (4) appellant's use of flexi-time was restricted; (5) appellant's job description was unusually specific; (6) the agency failed to provide appellant with adequate training; (7) apellant's performance appraisal was unusually specific; (8) the agency has not paid appellant his back-pay; (9) appellant was not allowed time to review audits done on his back-pay; (10) the agency has failed to pay appellant for a suspension effected subsequent to his reinstatement; (11) the agency has failed to pay appellant for 57 hours of sick and annual leave taken since his reinstatement; and (12) other unspecified instances of harassment.

In reviewing appellant's contentions, I would note that except for items 1 and 8, all contentions relate to problems occurring since reinstatement. Further, from my review of the appeal file, these problems seem to be a continuation of the difficulties between appellant and management officials which led to appellant's removal in 1980.

Without attempting to assess the blame for this situation I would simply note that none of these contentions raised by appellant are, in and of themselves, appealable to the Board. That is, I can find no authority for the Board to review appellant's position description, performance appraisal, agency restrictions on the use of sick and annual leave or flexi-time. Further, the suspension actions taken against appellant since his reinstatement have not exceeded 14 days and, thus, are not appealable to the Board. Clark v. Department of State, 3 M.S.P.B. 94 (1980); Marks v. Department of the Air Force, 2 M.S.P.B. 17 (1980).

Appellant is clearly contending that the agency's continuing harassment is a continuation of the earlier reprisal action culminated by his removal. Appellant further argues that this harassment constitutes a furtherance of the "prohibited personnel practices" taken against him. However, an allegation of "prohibited personnel practices" must be raised in conjunction with a matter otherwise appealable to the Board. Crary v. Federal Aviation Administration, 1 M.S.P.B. 458 (1980); Chleapas v. Department of Health, Eduction and Welfare, 1 M.S.P.B. 464 (1980); Alford v. Department of Health, Education and Welfare, 1 M.S.P.B. 305 (1980); Wren v. Department of the Army, 2 M.S.P.B. 174 (1980). Here, since the contentions raised by appellant are not directly related to his reinstatement and since the contentions raised are not, in and of themselves, appealable actions, I find that the raising of an allegation of "prohibited personnel practice" does not place these contentions within the Board's jurisdiction. Accordingly, these contentions will not be considered further. I would note, however, that appellant's contentions have been referred to the Board's Office of Special Counsel for any action it deems appropriate.

As noted, two contentions raised by appellant relate to the agency's compliance with the Board reinstatement order: (1) appellant's reassignment to Ninemile Zone, some 32 miles from his residence; and (2) the agency's failure to pay appellant his back pay. With regard to appellant's assignment to the Ninemile Zone, the agency argues that during the pendency of appellant's appeal, his previous position had been discontinued because of lack of work. Further, there was a need for a Civil Engineering Technician in the Ninemile Zone and, thus, appellant was assigned to this position.

Arguments raised by the agency, in this regard, show that it was in a quandry concerning appellant's assignment upon his reinstatement. Prior to appellant's removal an Office of Special Counsel evaluation had apparently found appellant's earlier assignment to Ninemile Zone was an act of reprisal. However, this same report had also found that assignment of appellant to a position in Missoula or to an "unsupported" position would also be an act of reprisal. In fact, this Office of Special Counsel evaluation recommended that appellant be reassigned to a position outside of the National Forest. It was appellant's failure to take the reassignment offered by the agency which led to appellant's removal. Upon reinstating appellant, the agency felt that it could justify appellant's assignment to the Ninemile Zone based on need, while any assignment to a postion in Missoula would be to an "unsupported" position.

Probative evidence here is the agency's statement that there was a need for appellant in the Ninemile Zone while there was no need for appellant at his previous location. I can find nothing in appellant's submissions which can be construed as a direct challenge to this assertion. Accordingly, I find that the agency had a bona fide reason for placing appellant in the Ninemile Zone. Further, such an assignment, which was to a position of like grade and pay as the one occupied by appellant at the time of his removal, was in compliance with the Board order of January 19, 1982.

Finally, in reviewing appellant's claim that he has not received "back pay" I note that his submissions contain nothing more than this bare assertion. However, the contention is specific enough for the agency to respond. No direct response was received from the agency on this claim, but the agency did state that it had "cancelled the removal action." Because of the lack of a response by the agency, I am unable to determine whether appellant has, in fact, received back pay for the time he was off the agency's employment rolls. Further, since this is a matter of compliance with as [sic] Board Order, I find that the burden is on the agency, once the allegation is raised, to show such compliance. Here, there has not been the requisite showing of compliance.

In summary, I find that, except for the following, contentions raised by appellant are not within the Board's jurisdiction and are therefore DISMISSED. I further find that the agency's action of assigning appellant to a Civil Engineering Technician position in Ninemile Zone was in compliance with the Board's reinstatement order. Finally, I find that the agency has not submitted evidence of compliance with that order on the issue of back pay. The agency is ORDERED to comply with the order by providing appellant with his back pay or, if it has already done so, provide this office with evidence of such compliance.

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on November 12, 1982, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of OPM, and the Special Counsel may file a petition for review. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

> (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, 1220 Vermont Avenue, N.W., Washington, D.C. 20419, no later than November 12, 1982. Three copies of the petition must be filed with the Secretary.

Purusuant to 5 U.S.C. 7703(b)(1)--as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. 1295(a)(9)--the appellant has the right to seek judicial review of the Board's final decision on this appeal.

A petition requesting such review must be filed with the U.S. Court of Appeals for the appropriate federal circuit no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

/s/
Steven L. Chaffin
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ARTHUR ANDERSON

v.

DEPARTMENT OF AGRICULTURE

DOCKET NUMBER
DE07528010123
COMP

OPINION AND ORDER

Appellant petitioned for appeal from the action of the Department of Agriculture, Lolo National Forest (agency) removing him from his position as a Civil Engineering Technician, GS-9, effective July 21, 1980, based on the charge of failing to report for a directed reassignment.

The Chief Appeals Officer of the then Denver Field Office (now Regional Office), acting in her capacity as a presiding official, issued an initial decision reversing the removal, finding that the reassignment was ordered in reprisal for appellant's protected whistleblowing activity and that no independent reason for the action was shown. This action constituted a prohibited personnel practice under 5 U.S.C. §2302(b)(8). The presiding official ordered that the agency set aside appellant's reassignment and further ordered "that the Forest Service and the Department of Agriculture cease immediately from retailiating against Mr. Anderson for his protected activity." *See* Initial Decision at 13 (November 10, 1980).

The Board denied the agency's petition for review of the initial decision in an Opinion and Order dated January 18, 1982. The Board affirmed the initial decision, modifying it to require the agency to also cancel the removal, and ordered the agency to furnish evidence of compliance with the Board order to the Denver Regional Office within twenty days of the date of the order. *See* *Anderron* v. *Department of*

Agriculture, MSPB Docket No. DE07528010123 (January 18, 1982).

On May 28, 1982, appellant submitted a petition for enforcement to the Denver Regional Office in which he contended that since his reinstatement, the agency has continued to engage in retaliatory conduct against him. Specifically, appellant alleged that: (1) he was reinstated to a position in the Ninemile Zone, approximately thirty-two miles from his former position; (2) the agency has failed to pay him his back pay; (3) he has been required to obtain a doctor's excuse for any sick leave taken; (4) his annual leave has been restricted; (5) his use of flexi-time has been restricted; (6) his job description is usually specific; (7) he has not been provided adequate training; (8) he has not been allowed to review audits done on his back pay; (9) he has not been paid for a suspension effected subsequent to his reinstatement; (10) the agency has failed to pay him for 57 hours of sick and annual leave taken since his reinstatment; (11) his performance appraisal was unusually specific; and (12) other unspecified instances of harassment.

Although the presiding official believed that appellant's difficulties were a continuation of the difficulties between the agency and the appellant which led to his earlier removal, he found the Board had jurisdiction only over the allegations concerning placement and back pay.[1/] He explained that since the other allegations of prohibited personnel practice were not raised in conjunction with an otherwise appealable action, the Board did not have the jurisdiction to consider them. See e.g., Crary v. Federal Aviation Administration, 1 MSPB 438 (1980). The

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[1/] Allegations (1) and (2) noted above.

presiding official found that appellant's reassignment to the position in the Ninemile region was bona fide as his former postion had been abolished subsequent to his removal and ordered the agency to pay appellant the back pay to which he was entitled. By letter dated October 27, 1982, the agency notified the Board that appellant had been provided back pay.

Appellant has petitioned the Board for review of the compliance decision alleging that the initial decision is based on an erroneous interpretation of statute or regulation. He alleges that the Board's jurisdiction over these actions arises pursuant to 5 C.F.R. §1201.181 et seq. and is not based upon its appellate jurisdiction. He states that the compliance decision fails to comport with the order contained in the initial decision that the agency cease retaliatory activity against him.[2]

The petition for review is GRANTED.

The Board's authority to review agency compliance with its decision is not limited to reviewing actions which are otherwise appealable to it. Section 1205(a) of Title 5, United States Code, grants the Board power to give effect to its decision. See Kerr v. National Endowment for the Arts, Appeal Nos. 83-865 and 83-866 (Fed. Cir. January 24, 1984).

Since an improper or unwarranted personnel action is void ab initio, the Board finds that the most effective method to insure that all of the ill effects of the improper action have been undone is to render the action null and void by cancellation, and Board orders giving effect to its decisions will ordinarily require the agency to take such action, Meier v. Department of the Interior, 3 MSPB 341, 349 (1980).

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[2] Appellant also states that the number of hours for which he has not been paid is now 120 for suspensions (three) and 172 for unpaid leave.

Further, the Board stated in Meier that:

> Ordinarily the Board's participation in a matter will end upon receipt of a certification of compliance with its order. In many circumstances such compliance can be effectuated merely by cancellation of the personnel action in question. However, in determining what future action should be taken with respect to appellant, the agency is cautioned that any personnel action taken in reprisal for the exercise of an appeal right is a prohibited personnel
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> practice. 5 U.S.C. § 2302(b)(9). Under 5 C.F.R. § 1201.181(a) an appellant may petition the Board for enforcement of any final decision. Under 5 C.F.R. §§ 1201.181 and 1201.184(a) the Board may take "all necessary action to ascertain [compliance and] ... under take efforts to obtain compliance." In giving effect to the purpose of these provisions the Board's power is both broad and continuing in nature. See S. Rep. No. 95-969, 95th Cong., 2d Sess. 29 (1978). Thus, subsequent agency action concerning a prevailing appellant even if not constituting

> a matter otherwise directly appealable to the Board, may be the subject of a petition under 5 C.F.R. § 1201.181, if for example, the agency's formal cancellation of appellant's removal is a mere subterfuge while other actions are taken to avoid substantive compliance.

3 MSPB at 350 n.8.

In this case, appellant has alleged that the actions taken by the agency since his reinstatement have undermined compliance with the order issued by the Board that the agency cease taking retaliatory actions against him. Although the actions complained of by appellant would not be otherwise appealable to the Board pursuant to its appellate jurisdiction, they are reviewable under its authority to assure continuing compliance with its decision. Therefore, it was error to dismiss these claims for lack of jurisdiction.

Additionally, the Board notes that subsequent to filing the instant petition, appellant filed an appeal from an agency action suspending him for 30 days for his refusal to comply with instructions, failure to complete a work assignment and unauthorized absence. The initial decision in that appeal indicates that appellant has raised and the presiding official has heard evidence concerning several of the reprisal allegations appellant asserts herein.3/ See Anderson v. Department of Agriculture, Case No. DE07528310173 (January 25, 1984). Appellant therefore has been afforded his due process rights to have these arguments considered by the Board and these arguments need not be considered again.

Accordingly, the initial compliance decision is AFFIRMED in part and VACATED in part. The action is REMANDED to the

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3/ In the initial decision, the presiding official found that the suspension action was not taken in reprisal for appellant's filing this successful appeal to the Board.

Denver Regional Office for further proceedings in accordance with 5 C.F.R. § 1201.181. The presiding official shall take all necessary action to ascertain whether the final decision of the Board is being complied with and shall issue a conmprehensive decision on the matter. In that decision, the presiding official need not consider any allegations of reprisal which were heard by him and considered in the initial decision in the subsequent suspension action.

Finally, the Board notes that the agency is again being represented by Thomas M. Beaumont in these proceedings. By Order dated October 2, 1980, Beaumont was disqualified to act as a representative or technical advisor in these proceedings because of a conflict of interest. This order has not been withdrawn by the Board. Therefore, on remand, Beaumont shall not represent the agency or act as a technical advisor.

FOR THE BOARD:

June 25, 1984

/s/
PAULA A. LATSHAW
Acting Secretary

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

ARTHUR J. ANDERSON	)
	)
v.	) CASE NO.
	) DE07528410149
	)
DEPARTMENT OF AGRICULTURE	) DATE:
FOREST SERVICE	) 11 SEP 1984
	)

INITIAL DECISION

INTRODUCTION

On May 14, 1984, Mr. Arthur J. Anderson (appellant) filed an appeal from the action of the Department of Agriculture, Nine Mile Ranger Station, Lolo National Forest, Missoula, Montana (agency) removing him from his position of Civil Engineering Technician, GS-082-09. The action was effective May 11, 1984. As an employee in the competitive service who has completed one year of current, continuous service and who is not serving a probationary period, appellant may appeal his removal action to the Merit Systems Protection Board (Board) pursuant to 5 U.S.C. 7701 and 7511-7513 (1983).

The agency action is AFFIRMED.

BACKGROUND

Appellant was previously removed from his position on July 21, 1980, for failing to report for a directed geographic reassignment to the Klamath National Forest in orthern California. The presiding official in that matter found that the action was taken for prohibited personnel practice reasons and reversed the agency action. Appellant was reinstated to his position and the agency was ordered to cease retailiating against appellant for his protected activities.

Appellant was subsequently suspended from his position from May 1, 1983, to May 25, 1983, for refusal to comply with instructions; failure to complete a work assignment as directed by his supervisor; and unauthorized absence from duty (AWOL). The presiding official found the charges were supported by the evidence and affirmed the agency action. Apellant filed a petition for review of the initial decision and the Board has not yet issued a final decision in this matter.

In addition to the above matters, the record in this matter also shows that appellant was suspended from his position from September 20, 1982, through October 1, 1982, for refusal to comply with his supervisor's instructions. He was also suspended from his position on May 31 through June 11, 1982, for failure to comply with instructions from his supervisor to provide the supervisor with information pertaining to appellant's alleged sickness during work hours. Finally, appellant was also suspended from duty from April 5, 1982 through April 9, 1982, for refusal to comply with instructions and unauthorized absence from duty.

ANALYSIS AND FINDINGS

The notice of proposed removal charges appellant with two instances of insubordination. Specifically, the agency states that appellant refused to submit a Standard Form 71 (SF-71), Application for Leave, for his absences from the work place on Tuesday, November 8, 1983, and Monday, January 30, 1984.

On November 8, 1983, when appellant was about to leave, he was reminded by his supervisor of the need to submit the SF-71 requesting leave for the time involved in accordance with organizational policy. Appellant did not submit the SF-71; therefore, his supervisor charged the time involved to Absence Without Leave.

On January 30, 1984, appellant was again absent from the work place from 1445 to 1500. On February 3, 1984, appellant's supervisor asked him to submit an SF-71 for the sick leave appellant was requesting for that absence in accordance with organizational policy. Appellant refused to do so. Appellant's supervisor thereafter issued a letter of instruction to appellant to comply with the agency leave policy and submit an SF-71 for the leave taken on January 30, 1984. Appellant again refused to do so (Agency Tabs 12 and 13).

Appellant admits that he refused to request leave by submitting an SF-71. He claims, however, that he was not required to do so by the agency service manual. He states that the agency service manual permits him to initial the Time and Attendance record rather than requiring him to complete the SF-71; therefore, the order from his supervisor to complete an SF-71 for approval of leave is illegal.

With respect to appellant's obligation to obey an order based upon the alleged invalid policy 1/, the Board has held 2/ that an employee is obliged to obey the agency's order while taking whatever necessary steps which are appropriate to challenge the ultimate validity of the order and policy. "To find otherwise would have the effect of undermining the statutory scheme established to preserve employee rights without unreasonably preventing agencies from carrying out their missions."3/ Under limited circumstances, employees may disobey an order which would place them in a clearly dangerous situation.4/ Furthermore, an employee does not have the right to disregard a law, rule or regulation merely because substantial reason exists regarding the validity of that law, rule

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1/ See Walker v. Birmingham, 388 U.S. 307.
2/ Gragg v. United States Air Force, 11 MSPB 546, 547 (1982).
3/ Id.
4/ See Whirlpool Corp. v. Marshall, 100 S.Ct. 883 (1980).

or regulation.

In the instant case appellant admits that he deliberately disobeyed an order from his supervisor. Moreover, the record (agency tab 5) shows that appellant had previously filed an unfair labor practice regarding the agency's policy of not allowing employees at some work stations to initial time and attendance (T/A) records for leave taken. However, the unfair labor practice was dismissed. 5/ Therefore, I find that appellant had previously taken appropriate steps to

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5/ By letter dated May 5, 1983, the Regional Director of the Federal Labor Relations Authority, Denver Regional Office, found that neither the collective bargaining agreement nor the agency's regulations preclude the practice of using the SF-71 for annual leave in amounts less than 40 hours or for sick leave in amounts less than 24 hours where it is feasible for the employee to initial the time and attendance report.

challenge the validity of the agency policy and/or procedure for requesting leave. Furthermore, appellant was on notice as early as May 1983 that the agency policy of requiring an SF-71 from employees when requesting leave was a valid agency management dciscretionary decision. Therefore, I find that the agency has sustained its charge of insubordination by the preponderance of the evidence. Moreover, I find that appellant's allegation that the order to complete an SF-71 when requesting leave was improper, therefore, invalid is without merit. I find it was his duty to obey the order while taking appropriate steps to challenge the validity of the agency leave policy. See Gragg, supra. See also Doolin v. U.S. Department of Justice, MSPB Docket No. BN07528210216 at 5 (July 3, 1984).

Appellant also claims that this action

was taken for prohibited personnel practice reasons. He claims that the instant action, as well as all other disciplinary actions together with the withholding of his within-grade increase are retaliatory actions against him presumedly for participating in protected whistleblower activity in 1980. 6/ He testified that in 1978 when he went to work for the Nine Mile station, a SF-71 was requested for leave. However, he pointed out to Bill Sherman, the administrative officer at the time, that the use of SF-71 was not necessary and Mr. Sherman did not enforce the requirement

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6/ Under the Civil Service Reform Act of 1978, an allegation of prohibited personnel practice may be raised as an affirmative defense to any agency action appealable to the Board. 5 U.S.C. 7701(c)(2)(B). Appelant has the burden to prove that he engated in a protected activity, and that there was a causal connection between the protected activity and the adverse action In re Frazier, 1 MSPB 159, 186 (1979). See 5 C.F.R. 1201.56(b)(2) (1984).

for the SF-71. However, when he returned to work in 1982, the SF-71 requirement was enforced. He admits that all employees except for two clerical workers are required to submit the forms. I find that the preponderance of the evidence is that all employees in appellant's work section were required to request leave by use of the SF-71. Moreover, the employees have been required to use the SF-71 to request leave before appellant went to work for the agency. Therefore, I find that appellant has failed to show that requiring the use of SF-71 was based on retaliation reasons.

Appellant also appears to argue that his current supervisor was told to harass him by his former supervisor. Appellant's supervisor, Mr. Applekamp testified that prior to his taking the current position he had been apprised that appellant had been reinstated after being removed.

However, it was Mr. Applekamp's position that he could work with appellant. He further testified, and appellant admits, that appellant was on sick leave restriction when Mr. Applekamp arrived but Mr. Applekamp rescinded the restriction when he became satisfied that appellant was no longer abusing his leave. Moreover, Mr. Applekamp testfied that he requires all of his employees to request all leave on a SF-71. Failure to request leave on the form meant that the leave would be disapproved and the employee would be charged with being absent without leave. This procedure for requesting leave had been instituted by the previous supervisor and he asked all employees to continue the practice. He testified further that it had always been his experience while working with the agency that a SF-71 was completed and submitted when an employee sought to take annual and/or sick leave. After observing Mr. Applekamp's demeanor, I find that his testimony is credible. Moreoever, I find that the preponderance of the evidence is that he took no action against appellant for retaliatory reasons. Accordingly, this allegation is dismissed.

In summary, I find that appellant has provided no evidence of retaliation by the agency against him. Contrary to his contention that he was removed for following instructions in the agency manual, the record in this matter shows that he was removed for refusing to follow his supervisor's instructions and orders with respect to the procedure to follow in requesting leave. Appellant admits that he refused to do so. Accordingly, I find that the agency has shown by the preponderance of the evidence that appellant willfully and deliberately refused to obey his supervisor's order.

Under 5 U.S.C. 7513(a) (1983), a removal action may only be taken for such cause as will promote the efficiency of the federal service. The agency has the burden under 5 U.S.C. 7701(c)(1)(b) (1983), to show that its decision is supported by the preponderance of the evidence.

In determining the severity of the action, the agency relied on appellant's past disciplinary record in determining that appellant should be removed from his position.

An agency may rely on a past disciplinary record in determining the appropriateness of a penalty only when; (1) the employee was informed of each prior action in writing; (2) the action was a matter of record; and (3) the employee was permitted to dispute the charges to a higher level than the authority that imposed the discipline.

Howard v. Department of the Army, 6 MSPB 180; Bolling v. Department of the Air Force, 8 MSPB 658 (1981).

At the hearing, appellant sought to challenge the merits of the prior disciplinary actions taken since he was reinstated by the Board from the 1980 removal. The extent of the Board's review of a past disciplinary record is limited to a determination of the three factors set forth above. Howard, supra. A review of the record in this matter shows that appellant's prior disciplinary actions were documented and that he was given the opportunity to dispute the charges to a higher level than the authority that imposed the discipline. 7/ I do note, however, that one of the suspension

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7/ Letters of decision and personnel actions effecting four (4) suspensions are contained in the appeal filed at Agency Tab 4.

actions relied upon by the Board is currently being reviewed by the Board; therefore, the suspension action from May 1 to May 25, 1983, may not be considered in the determination of the penalty in this matter. Accordingly, I find that the agency could consider three of the previous suspensions in determining the severity of the penalty in the instant case.

The agency also presented the testimony of the deciding official who testified that appellant had been previously suspended from his position for failure to comply with his supervisor's instructions. Moreover, he testified that appellant's attitude showed that he was not likely to change.

I agree with the agency. A review of the file in this matter shows that appellant was suspended four times (three of which have become final) for similar offenses. Moreover, he has filed unfair labor practices regarding the very matter for which he was removed and he was told at that time that he must comply with agency policy and more importantly, he must comply with his supervisor's instructions. Appellant has failed to do so. Accordingly, I find that the agency has supported the action by the preponderance of the evidence and the action was taken for such cause as will promote the efficiency of the service.

Finally, in his appeal, appellant argues that the instant action was taken because the Board would not enforce MSPB Order No. DE07528010123. I disagree. While I note that the Board has remanded appellant's petition for enforcement for further consideration 8/ by the presiding official of appellant's claims that the

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8/ Anderson v. Department of Agriculture MSPB Docket No. DE07528010123COMP (June 25, 1984).

agency continues to retaliate against him contrary to the instructions in MSPB Order No. DE075280101123, I have found no evidence of retaliation in the instant matter. Moreover, while appellant is protected against retaliation for having participated in protected activity, it is well established that an agency may impose disciplinary action for such cause as will promote the efficiency of the federal service. 5 U.S.C. 7513(a) (1983). Accordingly this allegation is dismissed.

DECISION

The agency action is AFFIRMED.

REVIEW RIGHTS

This is an initial decision of the Merit Systems Protection Board. It will become a final decision and order of the Board on October 16, 1984, unless a party files a petition for review with the Board on or bnefore that date or the Board reopens the case on its own motion. 5

C.F.R 1201.113 and 1201.117. An original and two copies of a petition for review must be filed with the Clerk of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 in accordance with 5 C.F.R. 1201.114 - .115.

Any appellant adversely affected or aggrieved by a final decision of the Board may file a petition with the U.S. Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. 7703(b)(1). A petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days after the Board's decision becomes final. Petitions must be sent to the Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

For the Board:

/s/
Antoinette C. Martinez
Presiding Official

ARTHUR J. ANDERSON, Appellant

V.

DEPARTMENT OF AGRICULTURE
U.S. FOREST SERVICE, AGENCY

DE075280C10123-1 [1]

United States of America
Merit Systems Protection Board
Denver Regional Office

November 20, 1984

Before JACK B. TOLL, Regional Director.

On remand from the Board for a determination concerning whether the agency complied with the Board's Final Order in this case. Held: The agency has complied with the Board's Order.

COMPLIANCE.

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[1] Refer to the Initial Decision on DE07528010123.

INITIAL DECISION ON COMPLIANCE

On November 10, 1980, this office issued an initial decision in the above captioned case. That initial decision reversed the agency's removal of appellant, finding it a prohibited personnel practice, and ordering cancellation of appellant's removal. Consequently, the agency petitioned for review with the Board in Washington, D.C. The Board, after considering the agency's arguments, issued an Opinion and Order, dated January 18, 1982, affirming the initial decision. The agency was ordered, in this opinion and order, to provide written verification of its compliance.

On May 28, 1982, this office received a Petition for Enforcement, from appellant. In that submission, and later submissions, appellant set forth certain actions by the agency which, he argued, demonstrated that the agency was not complying with the Board's decision. On October 8, 1982, this office issued an initial decision on compliance finding that the agency had complied with the Board's order for cancellation of the removal action. This compliance determination was, upon a petition for review by appellant, rescinded by the Board, and remanded for a "comprehensive decision on the matter."

Specifically, the Board found that many matters raised by appellant, found outside the Board's jurisdiction in that initial decision on compliance, should be reviewed to "ascertain whether the Board's final decision is being complied with." However, the Board in its remand order excluded from consideration any allegations of reprisal which were considered with regard to a subsequent appeal. This subsequent appeal was from an agency suspension action of 25 days, and was decided under initial decision DE07528310173. Appellant's petition for review of this initial decision was denied by the Board on October 25, 1984.

In its remand order, the Board identified 12 issues raised by appellant with regard to the agency's alleged failure to comply. These issues are: (1) his reinstatement to the Ninemile Engineering Area; (2) the agency failed to pay him back pay; (3) the agency placed him on sick leave restriction upon his return to duty; (4) use of his annual leave restricted; (5) his use of "flexi-time" restricted; (6) his job description was unusually specific; (7) he was not provided adequate training to perform his assigned duties; (8) he was not allowed to review audits of his back pay; (9) he was not paid for a period of time he was suspended; (10) the agency failed to pay him for 57 hours of sick and annual leave; (11) his performance appraisal was unusually specific; and (12) other unspecified instances of harassment.

In a further communication with the Board, invited as a result of the remand order, appellant also cited the fact that he was suspended four times after his reinstatement, that subsequently he has been removed form the federal service, that the agency improperly required him to schedule his restored annual leave, that prior to his removal in 1979, the agency withheld a within-grade pay increase, and that the agency was unusually slow in paying him his back pay.

As noted above, the Board exempted from consideration in this decision any allegations of reprisal considered in DE07528310173. That decision specifically considered whether the four suspensions taken against appellant were reprisals. It also considered, and disposed of, appellant's allegation that he received inadequate training. Finally, that decision dealt with the issue of appellant scheduling of restored annual leave. Thus, under the Board's remand order, none of these matters will be considered herein.

Moreover, I think it inappropriate to consider appellant's subsequent removal from the federal service here. That matter was considered by this office, and an initial decision affirming the removal action was issued. The matter is now pending before the Board. Thus, it will receive no further consideration in this decision.

The same is true of matters taken place before appellant's removal. It is difficult to see how the agency's failure to grant appellant a within-grade pay increase before his 1979 removal relates to the issue before me--whether the agency has complied with the Board's reinstatement order. Accordingly, this matter will receive no consideration here.

The first matter for consideration is appellant's assignment to the Ninemle Engineering Area. This matter was considered fully in the October 8, 1982, initial decision on compliance which found that such an assignment was not an act of reprisal. I reiterate that finding here.

In this regard, I again note that the agency was in a quandry concerning to which position appellant could be assigned, with "advice" coming from several sources. However, there was a need for appellant at his assigned work place, while there was no such need at his previous location. Moreover, I note that while appellant complains of the distance to his work station--30 miles one way--he then suggests that there were numerous other places in the state to which he could be reassigned. It was just such a reassignment which appellant refused in the first place and which led to the agency's removal action.

It is understood that appellant was being placed under supervision of those with whom he had previous difficulties. However, a reading of the correspondence between appellant and these individuals indicates that appellant did nothing to alleviate these difficulties; rather he seems to have delighted in taking every opportunity to exacerbate them. That is, communications from appellant's supervisors have a tone of conciliation and cooperation, while appellant's return communications are contentious and insubordinate.

In sum, I again find that the appellant's assignment to the Ninemile Engineering Area was to a bona fide position and was not an act of reprisal or a failure to comply with the Board's decision. Any subsequent problems appellant had in this position were of his own making.

Appellant next contends that the agency failed to pay him back pay, but then seems to concede that such back pay has now been paid because he renews this argument by complaining of the agency's slowness in making such payment. Appellant also argues that the agency has failed to allow him to review its audits on this matter.

Here again, I would note that written communications between appellant and the agency regarding the back pay matter are full of conciliation and cooperation on the agency's part, and a refusal to cooperate on appellant's part. The record contains several communications where appellant is requested to provide information which he has previously failed or refused to provide. It is hard to see how appellant can complain about the agency's pay determinations when he has been so uncooperative. I find no failure to comply with the Board's decision here.

Appellant next complains that his job description nad performance appraisal were unusually specific. However, a review of the provided job description was more specific than necessary or more specific than of those of other employees. Moreover, with regard to both the job description and performance appraisal, it should be recognized that since appellant's reinstatement, his agency has had to comply with the provisions on performance appraisals in the Civil Service Reform Act of 1978. These provisions require such specifics so that employee performance may be properly measured. Thus, I find no reprisal or failure to comply here.

Appellant next argues that immediately upon his return to duty, he was placed on sick leave restriction; i.e., he was required to bring a doctor's excuse for each sick leave absence. Appellant claims that the agency did not have just cause to place him under such restriction and, thus, its action was a form of reprisal. I disagree.

It is clear that appellant was under sick leave restriction prior to his removal. Then immediately upon restoration to duty, appellant, who had expressed dissatisfaction with his job assignment, was absent on sick leave for two days during his first week on duty. Appellant had also been seen in a local "bar" during the period he was on sick leave. Thus, it is apparent that the agency had ample cause to require appellant to justify his absences for sick leave. This sick leave restriction was lifted after appellant's leave usage improved. I find no reprisal or lack of compliance here.

Appellant also complains that the agency restricted his use of annual leave and specifically his restored annual leave. This issue is closely related to the issues considered in initial decision DE07528310173. In that case, appellant had refused to schedule his restored annual leave as directed by his supervisor. Finally, appellant requested 96 hours of leave and the request was denied because appellant had not completed an assigned project. Apellant took the time anyway, and was considered AWOL and subsequently suspended.

With regard to the inference that it is improper for the agency to regulate the use of appellant's annual leave, I must disagree. The agency clearly has the right to regulate the use of such leave, even to the extent of denying its use if necessary. Thus, it was not improper for the agency to require appellant to schedule his use of annual leave in a manner consistent with its need to accomplish its mission. I find no reprisal or failure to comply here.

The next claim raised is that the agency unreasonably restricted appellant's use of "flexi-time." However, the uncontroverted response from the agency indicates that appellant's supervisor restricted everyone in his supervision in the same manner and that it was well within his authority to do so. Thus, I can find no reprisal or failure to comply here.

Appellant next claims that the agency has failed to pay him for a suspension and also for 57 hours of sick and annual leave. The agency admits that it did not pay for either the suspension or the 57 hours, noting that appellant was charged AWOL for this period of "leave." The suspension action has been dealt with above and will not be considered again. With regard to the leave matter, I would simply note that appellant consistently refused to comply with agency requirements on sick and annual leave, and it was, thus, appropriate for the agency to consider him AWOL for these periods of time. I find no reprisal or failure to comply here.

Finally, appellant has, as noted by the Board, claimed other unspecified instances of harassment. Because of the failure to specify, however, they cannot be considered. I would simply note that it is my conclusion that appellant's restoration to duty, while a sensitive situation, would have been immeasurably easier if appellant had not immediately begun his contentious and insubordinate actions. I further conclude that these alleged acts of reprisal were largely contrived by appellant to further his conflict with the agency. Considering appellant's reinstatement, I an [sic] compelled to conclude that the agency did everything within its control to comply with the Board's order.

The agency COMPLIED with the Board's reinstatement order.

This is an initial decision of the Merit Systems Protection Board. It will become a final decision and order of the Board on December 25, 1984, unless a party files a petition for review with the Board on or before that date or the Board reopens the case on its own motion. 5 C.F.R. 1201.113 and 1201.117. An original and two copies of a petition for review must be filed with the Clerk of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 in accordance with 5 C.F.R. 1201.114 - .115.

Any appellant adversely affected or aggrieved by a final decision of the Board may file a petition with the U.S. Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. 7703(b)(1). A petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days after the Board's decision becomes final. Petitions must be sent to the Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

For the Board:

/s/
Jack B. Toll
Regional Director

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

ARTHUR J. ANDERSON, Petitioner, v. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Respondent	Appeal No. 85-2091/92 MSPB Docket Nos. DE075280C10123-1 and DE07528410149

DECIDED: February 18, 1986

Before DAVIS, Circuit Judge, MILLER, Senior Circuit Judge, and NEWMAN, Circuit Judge.

NEWMAN, Circuit Judge.

DECISION

This appeal is a consolidated proceeding for review of two Merit Systems Protection Board (Board) decisions, DE075280C10123-1 and DE07528410149. The former relates to a Petition for Enforcement filed May 28, 1982 in which Mr. Anderson alleged, and the Board declined to find, that the Department of

Agriculture, Forest Service (the agency) failed to comply with an earlier reinstatement order by the Board. The latter decision sustained Mr. Anderson's removal by the agency, effective May 11, 1984. We affirm.

OPINION

A. The Compliance Proceeding

Mr. Anderson was a GS-9 Civil Engineering Technician assigned to the Lolo National Forest in Missoula, Montana. He was discharged, effective July 21, 1980, for failure to report after reassignment to the Klamath National Forest in northern California. Mr. Anderson protested that the discharge was in reprisal for his whistle-blowing reports of mismanagement and waste of funds. The Board found no reason apart from protected whistle-blowing activity to support the reassignment, and concluded that the reassignment was based on a prohibited personnel practice. On January 18, 1982 Mr. Anderson's removal was cancelled and the Forest Service and the Department of Agriculture were ordered to cease retaliating against Mr. Anderson. Anderson v. Department of Agriculture, 9 M.S.P.R. 536 (1982).

On May 28, 1982 Mr. Anderson filed a Petition for Enforcement stating that since his reinstatement to the Ninemile Ranger District he had continued to suffer harassment and reprisal. On October 8, 1982 the Board issued an Initial Decision on Compliance in which it held that the agency was in compliance with the reinstatement order. On Mr. Anderson's Petition for Review, the Board vacated the Initial Decision and remanded for a "comprehensive decision". In its remand order the Board identified twelve contentions of Mr. Anderson concerning the alleged continued retaliatory conduct: he was reinstated to a position thrity-two miles from his former position; the agency failed to pay him back pay; the agency placed him on sick leave restriction upon his return to duty; his annual leave had been restricted; his use of flexi-time had been restricted; his job description was unusually specific; he had not been provided adequate training; he had not been allowed to review audits done on his back pay; he had not been paid for a suspension imposed subsequent to his reinstatement; the agency had not paid him for fifty-seven hours of sick and annual leave taken since his reinstatement; his performance appraisal was unusually specific; and other unspecified instances of harassment.

The Board thereafter analyzed each issue in light of the record presented to the presiding official, and found no reprisal activity, and no failure of agency compliance. The Board exempted from its consideration Mr. Anderson's allegations of inadequate training and of restrictions on the scheduling of annual leave in view of its decision DE07528310173, January 25, 1984, finding no reprisal, a decision which is not part of this appeal.

As to Mr. Anderson's first assertion, the Board stated that "there was a need for appellant at his assigned work place, while there was no such need at his previous location". The physical evidence on this point constitutes only one document. Contrary to Mr. Anderson's argument before us that the document is incompetent as hearsay, the Board could have considered it as part of the record. See Dorrance v. Department of Transportation, 735 F.2d 516, 519 (Fed. Cir. 1984), cert. denied sub nom. Schapansky v. Department of

Transportation, 105 S. Ct. 432 (1984); Hayes v. Department of the Navy, 727 F.2d 1535, 1538 (Fed. Cir. 1984). There was testimony by Mr. Anderson and by the agency on both sides of this question, and we conclude that substantial evidence supported the Board's conclusion that the transfer was not a retaliatory act.

As for back pay, the Board held that Mr. Anderson had conceded that he had been paid. Moreover, the Board found he had failed or refused to provide information pertinent to a back pay determination. Mr. Anderson has not disputed either holding on this appeal.

Mr. Anderson argues that the agency committed an act of reprisal by requiring a doctor's excuse for each sick leave absence. The Board found no such reprisal in view of Mr. Anderson's expressed dissatisfaction with his job assignment, absence on sick leave for two days during his first week of duty, and an occasion when he was seen in a tavern during a period asserted as sick leave. Moreover, such "sick leave restriction was lifted after [Mr. Anderson's] leave usage improved".

Mr. Anderson argues that prior to his first removal, he was placed on sick leave restrictions "similar to those instituted immediately upon his reinstatement". He asserts "[t]he same supervisory act without a present record of sick leave abuse is simply a renewed act of reprisal and harassment". Mr. Anderson argues that the tavern incident occurred over a month after the imposition of the sick leave restriction, but he concedes that he missed not two but three days out of his first week on duty. Mr. Anderson testified before the Board that he "violently disagreed with" the new restrictions which were "other than what the Forest Service Manual requires". The Board held that the agency had "just cause" to require Mr. Anderson to justify his absences for sick leave. In view of the factual circumstances, this conclusion is supported by substantial evidence.

Mr. Anderson's assertions that the agency improperly restricted his annual leave were also found unsupported by the Board. Annual leave restored because of an unwarranted or unjustified personnel action is scheduled in accordance with 5 C.F.R. § 550.805(f)(1):

> (1) A full-time employee shall schedule and use excess annual leave of 416 hours or less by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account. The agency shall extend this period by 1 leave year for each additional 208 hours of excess annual leave or any portion thereof.

The record shows that 408 hours of annual leave was restored to Mr. Anderson on February 26, 1982 and that the restored leave had to have been used by January 5, 1985 or be permanently forfeited. Mr. Anderson was requested, in June of 1982, to schedule his restored leave which he refused to do on the basis that he preferred "this annual leave as an insurance" to be scheduled sometime in 1984. The agency sought "to avoid unduly long periods of leave which might interfere with the work". On this basis, we agree with the Board that the agency could require Mr. Anderson to schedule his annual leave "in a manner consistent with its need to accomplish its mission".

Similarly, the Board found no reprisal in the agency's restriction of Mr. Anderson's use of "flexi-time" because uncontroverted evidence was presented showing that everyone under Mr. Anderson's supervisor was restricted in the same manner. Mr. Anderson asserts the Board erroneously relied on documents previously denied to him in a discovery request filed for another proceeding. While the Board erred as a matter of law in considering documents it had denied to Mr. Anderson, Mr. Anderson has not shown that such action constituted harmful error in the circumstances of this case. See 5 U.S.C. 7701(c)(2); Cornelius v. Nutt, 105 S. Ct. 2882, 2889 (1985); Mercer v. Department of Health and Human Services, 772 F.2d 856, 859 (Fed. Cir. 1985).

As for Mr. Anderson's job description, the Board found that it was no more specific than necessary or than that of other employees. The Board further found no reprisal or noncompliance in the agency's asserted failure to pay Mr. Anderson for fifty-seven hours of sick and annual leave taken since his reinstatement. In these highly fact-dependent findings, we do not discern abuse of discretion in the Board's holding.

We have carefully reviewed the record in light of Mr. Anderson's arguments, and conclude that there is inadequate basis for reversal of the Board's conclusion on the issue of agency compliance. Hayes v. Department of the Navy, 727 F.2d at 1537.

B. Removal from Service

Subsequent to his reinstatement to the Ninemile Ranger District, Mr. Anderson was suspended from duty on several occasions. From April 5-9, 1982 he was suspended for refusal to comply with instructions and unauthorized absence from duty. The first charge arose out of his failure to fill out an SF-71 Application for Leave, or to submit it to his supervisor for advance approval for planned annual leave. His subsequent absence from work without the requisite advance approval was the basis for the second charge. These charges were sustained by Orville Daniels, Employment Officer for the Lolo National Forest.

A second suspension was incurred from May 31 to June 11, 1982 for insubordination based on the failure of Mr. Anderson to comply with instructions from his supervisor to provide information pertaining to an alleged illness during working hours. Specifically, the tavern incident noted in Part A. This charge was also sustained by Orville Daniels.

A third suspension occurred from September 20 to October 1, 1982 based on Mr. Anderson's refusal to comply with his supervisor's request for a proposed leave plan for use of his restored annual leave. Mr. Daniels sustained the charge. Mr. Anderson was removed effectively May 11, 1984 for his failure to submit an SF-71 for each of two additional absences and his previous suspensions for insubordination.

The Board held that Mr. Anderson was obliged to obey the agency order concerning the SF-71, and to take appropriate steps thereafter to challenge the validity of the order, citing Walker v. City of Birmingham, 388 U.S. 307, reh'g denied, 389 U.S. 894 (1967), and Gragg v. United States Air Force, 13 M.S.P.R. 296, 299 (1982). Mr. Anderson's filing of an unfair labor practice charge with the Federal Labor Relations Authority (FLRA) regarding the leave regulations was taken by the Board as evidence that Mr. Anderson had, in fact, "previously taken appropriate steps to challenge the validity of the agency policy and/or procedure for requesting leave". Because of the FLRA's dismissal of the charge in May of 1983, the Board held that he was on notice as of that date that the agency's SF-71 requirement was a valid agency policy. The Board held that the agency had sustained its charge of insubordination on the basis of Mr. Anderson's admission that he deliberately disobeyed this order from his supervisor.

Mr. Anderson argues, as he did before the Board, that this removal action was in retaliation for his whistle-blowing activities in 1980. The Board found, and Mr. Anderson conceded, that nearly all the employees in Mr. Anderson's work section were required to request leave by submission of an SF-71 and that such requirement was in force at the time of Mr. Anderson's reinstatement. The Board concluded that Mr. Anderson failed to prove retaliatory intent.

Mr. Anderson further argues that the Board erred in relying on his prior suspensions in determining that removal was an appropriate penalty. As elucidated in Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305 (1981), an employee's past disciplinary record is a factor relevant for consideration in determining the appropriateness of a penalty. Previous suspensions may be considered in determining the severity of the penalty. Villela v. Department of the Air Force, 727 F.2d 1574, 1577 (Fed. Cir. 1984).

This court does not disturb the agency's choice of penalty, unless shown to be an abuse of the agency's discretionary authority. See DeWitt v. Department of the Navy, 747 F.2d 1442, 1445 (Fed. Cir. 1984), cert. denied, 105 S. Ct. 1759 (1985); Brewer v. United States Postal Service, 647 F.2d 1093, 1098, 227 Ct. Cl. 276, 282 (1981), cert. denied, 454 U.S. 1144 (1982); 5 U.S.C. § 7703(c); Hayes v. Department of the Navy, 727 F.2d at 1537. [sic]

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL COURT

ARTHUR J. ANDERSON,)
)
Petitioner,) Appeal Nos.
) 85-2091/2092
v.)
) MSPB Docket Nos.
DEPARTMENT OF) DE075280C10123-1
AGRICULTURE,) and
FOREST SERVICE,) DE07528410149
)
Respondent)

Before DAVIS, Circuit Judge, MILLER, Senior Circuit Judge, and NEWMAN, Circuit Judge.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby, is denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/
Francis X. Gindhart,
Clerk

Date: 4/14/86
cc: Mr. Robert Kolesar
Ms. Hillary A. Stern

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL COURT

ARTHUR J. ANDERSON,	)	
Petitioner,	)	Appeal Nos. 85-2091/2092
v.	)	
DEPARTMENT OF AGRICULTURE, FOREST SERVICE,	)	MSPB Docket Nos. DE075280C10123-1 and DE07528410149
Respondent	)	

Before DAVIS, Circuit Judge, MILLER, Senior Circuit Judge, and NEWMAN, Circuit Judge.

ORDER

A petition for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/s/
Francis X. Gindhart,
Clerk

Date: 4/28/86

cc: Mr. Robert Kolesar
Ms. Hillary A. Stern, DOJ

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL COURT

ARTHUR J. ANDERSON,)
)
Petitioner,)
)
v.) Appeal No.
) 85-2091/2092
DEPARTMENT OF)
AGRICULTURE,)
)
Respondent)

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD.

IN CASE NO(s) DE07528410149

THIS CAUSE HAVING BEEN HEARD AND CONSIDERED, IT IS

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/
Francis X. Gindhart, Clerk

Dated: February 18, 1986

ISSUED AS A MANDATE: APRIL 28, 1986
COSTS; Against, Petitioner
PRINTING---------------------$143.84
TOTAL------------------------$143.84

cc: Ms. Hillary A. Stern, Esq.

United States Court of Appeals for the Federal Circuit

ARTHUR J. ANDERSON,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,

Respondent.

Appeal Nos. 85-2091/2092

MSPB Docket Nos.
DE07528OC10123-1 and
DE07528410149

Before DAVIS, Circuit Judge, MILLER, Senior Circuit Judge, and NEWMAN, Circuit Judge.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart

Francis X. Gindhart, Clerk

4/28/86

Date

cc: Mr. Robert Kolesar
Ms. Hillary Stern, DOJ

United States Court of Appeals for the Federal Circuit

ARTHUR J. ANDERSON,
Petitioner,

vs.

Appeal No. 85-2091/2092

DEPARTMENT OF AGRICULTURE,
Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD.
IN CASE NO(s). DE07528410149.
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT

DATED Feb. 18, 1986

Francis X. Gindhart
FRANCIS X. GINDHART, CLERK

ISSUED AS A MANDATE: April 28, 1986
COSTS: Against, Petitioner
PRINTING——————————$143.84
TOTAL——————————$143.84
cc: Hillary A. Stern, Esq. ✓

154-F85-572

United States Court of Appeals for the Federal Circuit

ARTHUR J. ANDERSON, Petitioner, v. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Respondent.	)	Appeal No. 85-2091/2092 MSPB Docket Nos. DE075280C10123-1 and DE07528410149

Before DAVIS, Circuit Judge, MILLER, Senior Circuit Judge, and NEWMAN, Circuit Judge.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby, is denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

Francis X. Gindhart

Francis X. Gindhart, Clerk

4/14/86

Date

cc: Mr. Robert Kolesar
    Ms. Hillary A. Stern, DOJ

FULL TEXT OF 5 U.S.C. §§ 2301 AND 2302

§2301. Merit system principles

(a) This section shall apply to --

(1) an Executive agency;

(2) the Administrative Office of the United States Courts; and

(3) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and

equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should

be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be --

(A) protected against arbitrary action, personal; favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees

reasonably believe evidences-

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter [5 USCS §§2301 et seq.]-

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title [5 USCS § 2302(a)(2)(C)]), the President shall, pursuant to the authority otherwise available under this title [5 USCS§§ 101 et seq.], take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any

action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title [5 USCS §§ 101 et seq.] and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

(Added Oct. 13, 1978, P.L. 95-454, Title I, § 101(a), 92 Stat. 1113.)

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title [5 USCS §§ 1 et seq], "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section-

(A) "personnel action" means-

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title [5 USCS §§ 7501 et seq.] or other disciplinary corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title [5 USCS §§ 4301 et seq.];

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include-

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an executive agency, the Administrative Office of the United States Courts, and the Government Printing

Office, but does not include-

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

(1) discriminate for or against any employee or applicant for employment-

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)

[42 USCS§ 2000e-16];

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a) [29USCS§§631, 633a];

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C.206(D)) [29 USCS §206(d)];

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) [29 USCS § 791]; or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on

the personal knowledge or records of the person furnishing it and consists of–

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for

employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title [5 USCS §3110(a)(3)]) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title [5 USCS §3110(a)(2)]) or over which such employee exercises jurisdiction or control as such

an official;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for-

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel

of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance

of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title [5 USCS § 2301].

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under-

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) [42 USCS § 2000e-16], prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a) [29 USCS § 631, 633a], prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)) [29 USCS §206(d)], prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) [29 USCS §791], prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(Added Oct, 13, 1978, P.L. 95-454, Title I, § 101(a), 92 Stat. 1114.)